

How law and economics may contribute to the harmonisation of tort law in Europe

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How Law and Economics May Contribute to the Harmonisation of Tort Law in Europe

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Summary of contents

- A. Introduction
 - I. Importance for various reasons
 - 1. A contribution to the search for principles
 - 2. Critical analysis of European (private) law
 - 3. Making the subsidiarity principle work
 - II. Fields of application
 - III. Possibilities for and limits of the economic analysis of federalism
 - IV. Structure
- B. Starting points for (de)centralisation in general
 - I. Tiebout
 - II. Competing legal orders
 - III. "Bottom up federalism"
- C. The criteria for centralisation of tort law
 - I. The transboundary character of the externality
 - 1. General
 - 2. Example: environmental liability
 - a) "Economy of scale" argument
 - b) Alternative solutions?
 - c) Applied to environmental liability
 - d) Critique of the White Paper on Environmental Liability
 - 3. Example: product liability
 - 4. Example: medical malpractice
 - II. The race for the bottom
 - 1. General; the risk of destructive competition
 - 2. Example: environmental liability
 - a) Is there a risk of a race for the bottom?
 - b) Empirical evidence of pollution havens
 - c) Is there a race-for-the-bottom in environmental liability?
 - 3. Example: product liability
 - 4. Example: medical malpractice
 - III. Harmonisation of marketing conditions
 - 1. General
 - a) The race for the bottom versus a common market
 - b) "Levelling the playing field"
 - 2. Example: environmental liability
 - 3. Example: product liability
 - a) Product safety versus product liability
 - b) Product Liability Directive: harmonisation?
 - 4. Example: medical malpractice
 - IV. Reduction of transaction costs
 - 1. General

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2. *Example: environmental liability*
3. *Example: product liability*
4. *Example: medical malpractice*
- V. *Minimum level of protection*
 1. *General*
 2. *Example: environmental liability*
 - a) *Economic approach: differentiation according to preferences*
 - b) *Guaranteeing minimum environmental quality?*
 - c) *Minimum quality, not liability standards*
 3. *Example: non-pecuniary losses*
 4. *Example: medical malpractice*
- D. *Policy aspects*
 - I. *General*
 - II. *Public choice considerations*
 - III. *Example: product liability*
 1. *Fear of an "American" crisis*
 2. *Agricultural products*
 3. *Compensation fund*
 4. *Erecting barriers to entry?*
 - IV. *Example: environmental liability*
- E. *Concluding remarks*
 - I. *Reasons for harmonisation: a few general lessons from the economic debate*
 - II. *What to harmonise: a few specific hints from the economic debate*

A. *Introduction*

I. *Importance for various reasons*

In this paper I address the potential contribution of the economic analysis of law to the debate concerning the need for the harmonisation of tort law in Europe. The focus of this paper will indeed mainly be on this harmonisation issue. It is important to stress this since the economic analysis of law could be useful to a study of European integration at various levels.

1. *A contribution to the search for principles*

First of all the economic analysis of tort law has the advantage that it allows us to focus on the economic functions of a system of accident law. Thus, economic analysis enables us to analyse the basic principles underlying many tort systems in Europe. For instance, economic analysis can explain why many European tort systems have chosen a strict liability regime for hazardous activities and have kept a negligence/fault regime for non-hazardous activities. By focusing on the basic ideas which underlie tort law in many legal systems economic analysis can contribute to European integration. Indeed, it is precisely by focusing on the basic economic notions behind a tort system, that the comparative lawyer may discover whether differences between legal systems are in fact merely a matter of legal technique or whether the differences are the result of differing values and preferences. Often the differences in legal technique are linked to different legal traditions as they have developed as a result of doctrinal habits in a specific legal system. This is not to say that these technical differences are unimportant. However, in some cases economic analysis of law can show that, although there may be huge differences between various legal systems as far as the legal form and technique is concerned, the underlying values and principles may be similar. By this focus on the basic princi-

ples of tort law, economic analysis may in some cases show that differences between some legal systems are not as huge as one would imagine at first sight. The flip side of this is that economic analysis of tort law indeed simplifies the working of tort law by not addressing the details of the legal technique but specifically by focusing on the functions and goals that tort law might wish to achieve. Some lawyers would argue that this focus on principles and neglect of the details of the legal technique leads to a simplification of the tort system. That is undoubtedly to some extent the case. However, this simplification may, specifically from an integration perspective, have the major advantage of focusing precisely on the underlying principles of a tort law system. This focus on underlying principles instead of on legal technique may thus enable a “bridging of the unbridgeable”.¹

However, within the scope of this paper I do not focus on the basic economic analysis of tort law to show this.² The economic analysis of tort law has already been incorporated into European academic legal work. Many traditional tort lawyers in Europe now make use of economic arguments.³

2. *Critical analysis of European (private) law*

A second benefit of the economic analysis of law for European integration is the simple fact that economic methodology can be used to have a critical look at existing European legislation in the field of private law. Thus, economic analysis can be used to look at the efficiency of, for example, the regime provided by the European Product Liability Directive of 25 July 1985⁴ or to have a critical look at the previous draft directive on the liability of the suppliers of services.⁵

Indeed, economics uses the efficiency criterion to analyse whether a certain legal regime will promote social welfare or not. Many lawyers argue that, though this may be an interesting criterion, it is not decisive, since the goal of law is certainly not just to promote efficiency. However, in this respect it is important to make a difference between the positive economic analysis of law on the one hand and normative economic analysis on the other hand. In a positive economic analysis economics is used to analyse the economic effects of the law as it is, without necessarily indicating that efficiency is a value by which legal rules can be judged. Such a positive economic analysis can be highly useful since it often includes effectiveness tests. Thus economic analysis allows us, as an example, to test whether the goals set by the (European) legislator can actually be reached with the instruments used. This information is obviously useful for any assessment of a legal framework. In a normative economic analysis efficiency is used as a criterion to judge legal rules. Many lawyers may have more difficulties with that. But

1 See *W. van Gerven*, Bridging the unbridgeable: Community and national tort laws after Francovich and Brasserie, (1996) ICLQ 507.

2 See, for the basic arguments, *S. Shavell*, *Economic Analysis of Accident Law* (1987).

3 See e.g. for Germany, *H. Kötz/G. Wagner*, *Deliktsrecht* (9th edn., 2001), 17-20.

4 OJ 1985 L 210/20. For an analysis, see *M. Faure*, Product liability and product safety in Europe: harmonisation or differentiation?, *Kyklos* 53 (2000), 467.

5 See *M. Faure*, Enkele rechtseconomische kanttekeningen bij de dienstenaansprakelijkheid, A&V 1994, 33 and *C. Curran*, The burden of proof and the liability rule for suppliers of services in the EEC, *GPRI* 1994, 85-98.

even if one accepts that the law serves purposes other than efficiency, economic analysis can still provide useful information, for example, on the costs and benefits of a specific legal regime.

3. *Making the subsidiarity principle work*

The third way in which economic analysis can be useful for European integration is that economics has focused a lot of attention on the division of competences within federal systems. It is precisely in this way that I will use economic analysis in this paper. This is a topic which, in a European legal perspective, is obviously relevant to the subsidiarity principle. From an economic perspective the question which is addressed in the economics of federalism is what the optimal level would be for specific types of regulation. In this paper I argue that that literature is highly useful also for addressing the harmonisation debate with respect to tort law. In the paper I address the desirability of the harmonisation of tort law from an economic angle. Economists have indeed paid a lot of attention to the potential goals, functions and economic effects of a harmonisation of law.⁶

II. *Fields of application*

In this paper, the economic criteria in favour of or against the centralisation of decision making will also be applied to a few specific domains of tort law, i.e. environmental liability, product liability and medical malpractice. In each of these cases I address what the possible benefits may be of harmonisation efforts. Moreover, I also address some general issues of tort law such as the choice between strict liability and negligence and compensation for non-pecuniary losses.

The reason for providing examples more specifically on the domains of environmental liability and product liability are relatively clear: those are two areas where we can typically expect "transboundary torts", meaning that the argument in favour of harmonisation may be particularly strong in these areas. Moreover, product liability has so far been one of the only areas where the European Commission has successfully enacted legislation leading to a (partial) harmonisation of private law. With respect to environmental liability the European Commission is also undertaking initiatives in the direction of a (more modest) harmonisation. See in this respect the well-known White Paper on Environmental Liability issued by the European Commission on 9 February 2000.⁷ But

6 This paper builds on earlier research in which harmonisation efforts were analysed from an economic angle with respect to environmental law (*M. Faure*, Harmonization of Environmental Law and Market Integration: Harmonizing for the Wrong Reasons?, (1998) EELR 169), environmental liability (*M. Faure/K. De Smedt*, Should Europe Harmonise Environmental Liability Legislation?, (2001) EL 217), medical malpractice (*M. Faure*, Kompensationsmodelle für Heilwesenschäden in Europa mit Ausblick auf die EG-Rechtsharmonisierung, ZEuP 2000, 575) and product liability (*Faure*, *Kyklos* 53 (2000), 467). The analysis in this paper, however, broadens the issue by addressing the harmonisation of tort law at a more general level.

7 White Paper on Environmental Liability, COM (2000) 66 final, Brussels, 9 February 2000. For comments, see *P. Rice*, From Lugano to Brussels via Arhus: Environmental Liability White Paper published, (2000) EL 39; *E. Rehlinger*, Towards a community environmental liability regime: the Commission's White Paper on Environmental Liability, (2000) EL 85; and *M. Faure*, The White Paper on Environmental Liability: efficiency and insurability analysis, (2001) EL 188.

in addition I also look at the question of whether, from an economic angle, Europe should strive for a more general harmonisation of tort law. This seems an interesting issue, given the many (mostly academic) initiatives that have recently been undertaken in that direction. Therefore, I also briefly look at medical malpractice, as an example of an accident situation where the effects – as a general rule – do not cross national borders.

III. Possibilities for and limits of the economic analysis of federalism

The economics of federalism seems to be a particularly appropriate way of looking at harmonisation efforts in Europe because the European Commission has been using economic arguments to justify its harmonisation efforts for some time. More specifically the argument has long been advanced that a harmonisation of law, including private law, is necessary in order to harmonise the conditions of competition within Europe. One aspect of this paper is devoted to an analysis of whether this “economic” argument for the harmonisation of the conditions of competition is indeed a valid economic justification for harmonisation. Moreover, applying the economics of federalism to the harmonisation of tort law within Europe also has the advantage that a balanced view can be presented of the need to harmonise tort law. Indeed, economic analysis does not come up with black or white statements in favour of or against harmonisation, but allows balanced criteria to be advanced on the basis of which those areas and topics which may be good candidates for harmonisation are indicated.

Of course the reader should be aware that applying the economics of federalism to the harmonisation issue means that I will only provide “one view of the cathedral”.⁸ As was mentioned above, I do not deal with the basic economic analysis of tort law. Moreover, the harmonisation issue is addressed only from an economic angle in this paper. Although I have argued above that I think that economics can provide an interesting contribution to the harmonisation debate, I want to repeat that I realise that this really is just one view of the cathedral. One may indeed well argue that there may be other, non-economic, arguments for a harmonised liability system, such as the belief that this will lead to a higher degree of victim protection than Member States would achieve when using national liability law. But even if non-economic arguments are advanced to justify European harmonisation, it seems important that in future European documents these reasons are clearly explained within the scope of the subsidiarity principle.

IV. Structure

The structure of this paper is as follows: after this introduction (A.) a brief insight is provided into the criteria for (de)centralisation in general (B.). Then these criteria are applied to tort law by focusing more specifically on the reasons for centralisation (C.). We then turn to some policy aspects of the harmonisation of tort law by addressing it from an interest group perspective (D.) and formulate a few concluding remarks (E.).

⁸ Paraphrasing the words of *Calabresi* and *Melamed* (*G. Calabresi/D. Melamed*, Property rules, liability rules and inalienability: one view of the cathedral, (1972) 85 Harvard LR 1089).

B. Starting points for (de)centralisation in general⁹

I. Tiebout

The question of whether regulation should be promulgated at a central (European or federal) level or at a more decentralised level (or, to generalise, what kind of regulation should be set at which level) has been addressed in the economics of federalism. The starting point for the analysis is usually *Tiebout's* theory about the optimal provision of local public goods.¹⁰ *Tiebout* argued that when people with the same preferences cluster together in communities, competition between local authorities will, under certain restrictive conditions, lead to allocative efficiency. If there are, for example, in one community citizens who greatly prefer sporting facilities and in another a majority of citizens with a preference for opera, the first community will probably construct sporting facilities, whereas the second may build an opera house. If someone living in the second community preferred sporting facilities to the opera house, he could then move to the first community, which apparently provides services more to his tastes. The idea is that well-informed citizens will move to the community that provides the local services that are best adapted to their personal preferences. Through this so-called "voting with the feet", competition between local authorities will lead citizens to cluster together according to their preferences.¹¹ In practice, it is clear that different communities do indeed offer a variety of different services. The idea is that the citizen can have an effect on this provision of local public goods either by influencing the decision making (vote) or by moving (exit).

II. Competing legal orders

This basic idea applies not only to community services, but also, for example, to fiscal decisions¹² and environmental choices.¹³ In addition, this idea of citizens moving to the community that provides services which best correspond with their preferences can also be applied with respect to legal rules. Thus, it has been argued by *Van den Bergh* that competition between legislators will lead to legal systems competing with

9 This part of the paper is largely based on the inauguration address of *Roger Van den Bergh*, in which the economic literature of the criteria for (de)centralisation is discussed (*R. Van den Bergh*, *Subsidiariteit rechtseconomisch bekeken. Adieu Bruxelles?* (1994); an English summary of this address has been published by *R. Van den Bergh*, *The Subsidiarity Principle in European Community Law*, *MJEC* 1994, 337). See also *R. Van den Bergh*, *Towards an Institutional Legal Framework for Regulatory Competition in Europe*, *Kyklos* 53 (2000), 435.

10 *C. Tiebout*, *A Pure Theory of Local Expenditures*, (1956) *JPE* 416. For a discussion, see *S. Rose-Ackerman*, *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* (1992), 169 f.

11 Compare *D. C. Mueller*, *Federalism and the European Union: A Constitutional Perspective*, (1997) 90 *Pub Ch* 255.

12 See, e.g., *R. Inman/D. Rubinfeld*, *The EMU and Fiscal Policy in the New European Community: An Issue for Economic Federalism*, (1994) *IRLE* 147 and *G. Kirchgässner/W. Pommerehne*, *Tax Harmonisation and Tax Competition in the European Community: Lessons from Switzerland* (paper presented at the Cost Meeting in Luzern, November 1993) and *W. Oates*, *Fiscal Federalism* (1972).

13 So *W. Oates/R. Schwab*, *Economic Competition among Jurisdiction: Efficiency Enhancing or Distortion Inducing?*, (1988) 35 *JPE* 333.

each other to provide legislation that corresponds best to the preferences of citizens. Also *Ogus* argues that the various lawmakers in the nation-states will create a competitive market for the supply of law.¹⁴ The idea therefore is that in an optimal world, citizens will cluster together in states that provide legal rules that correspond to their preferences. Well-informed citizens who are dissatisfied with the legislation provided could move (voting with the feet) to the community that provides legislation that corresponds best to their preferences. This idea, assuming that different legal systems offer different legal rules to satisfy the demands of the citizens, thus explains the variety and differences between legal systems.¹⁵ Moreover, it also shows that differences between the various legal rules of different countries should not necessarily be judged negatively, as is often the case in Europe today. The idea of competing legal systems can probably best be seen “in action” in international private law where parties can choose the legal system that best suits their needs in a choice of law regime.¹⁶ *Frey* and *Eichenberger* have proposed an extreme form of this competition between legal orders by suggesting the emergence of Functional Overlapping Competing Jurisdictions (FOCJ), whereby citizens may choose different governmental authorities for different functions of government.¹⁷

Obviously, this system, assuming that competition between legal orders leads to allocative efficiency in the provision of legal rules, works only if certain conditions are met. One condition is that citizens have adequate information on the contents of the legal rules provided by the various legislators, in order to be able to make an informed choice. In addition, exit is often costly, so people may stay even if the (legal) regime does not best suit their needs.¹⁸ Moreover, a location decision is obviously made under the influence of a set of criteria, in which the legal regime may not be decisive.¹⁹ Usually the job location and residence are so important that in reality there is little left for people to choose.²⁰ Finally, as we will discuss below, this system of competition between legal orders works only if the decisions in one legal order have no external effects on others.

14 *A. Ogus*, Competition between National Legal Systems: A Contribution to Economic Analysis to Comparative Law, (1999) ICLQ 405; and see *A. Ogus*, The Contribution of Economic Analysis of Law to Legal Transplant, in: J. Smits (ed.), The Contribution of Mixed Legal Systems to European Law (2001), 27.

15 *Van den Bergh*, MJECL 1998, 134 and *Van den Bergh*, Kyklos 53 (2000) 437.

16 Although the choice for a particular legal regime may not always be related to the quality of the legal system but, say, to the quality of the court or arbitration system. The latter explains, according to *Ogus*, the popularity of English law in choice of law clauses in contracts (*Ogus*, (1999) ICLQ 408).

17 *B. Frey*, FOCJ: Competitive Governments for Europe, (1996) IRLE 315; see also *B. Frey/R. Eichenberger*, To Harmonise or to Compete? That's Not the Question, (1996) JPE 335 and *A. Casella/B. Frey*, Federalism and clubs. Towards an Economic Theory of Overlapping Political Jurisdiction, EER (1992), 639.

18 As *Ogus* states, there should be no barriers to the freedom of establishment and to the movement of capital (*Ogus*, (1999) ICLQ 407). For these conditions, see also *Van den Bergh*, Kyklos 53 (2000) 438.

19 That is one of the reasons why *Frey* and *Eichenberger* argue in favour of FOCJ: the choice for one legal or institutional regime should not be exclusive; there may be ‘overlapping’ jurisdictions depending upon the different functions (*Frey/Eichenberger*, (1996) JPE 316-318).

20 *Rose-Ackerman*, Rethinking (Fn. 10), 169.

III. "Bottom up federalism"

In economic literature, the *Tiebout* model is used to argue that, from an economic point of view, decentralisation should be the starting point, since competition between legislators will lead to allocative efficiency. *Van den Bergh* also uses this theory to provide criteria for centralisation/decentralisation within the European Union. Taking *Tiebout* as a starting point and assuming that competition between decentralised legislators will lead to an optimal provision of legal rules, the crucial question is: why centralise? *Van den Bergh* criticises that part of the current discussion in the European legal literature which seems to focus on the question why there should be decentralisation (referred to by *Van den Bergh* as "top down federalisation"). According to economic theory, that is the wrong question. Starting from *Tiebout's* model, there is reason to believe in what *Van den Bergh* calls a "bottom up federalisation", assuming that in principle the local level is optimal, since the local level has the best information on local problems and on the preferences of citizens. Decision making should be moved to a higher level only when there is a good reason.²¹ Economic theory has indeed suggested that there may be a variety of reasons why the local level is not best suited to take decisions and that there are occasions when central decision making can lead to more efficient results.

I will now apply these criteria for centralisation and relate them to the harmonisation of tort law in Europe.

C. The criteria for centralisation of tort law

I. The transboundary character of the externality

1. General

The *Tiebout* argument in favour of competition between local communities obviously works only if the problem to be regulated is indeed merely local. Once it has been established that the problem to be regulated has a transboundary character, there may be arguments to be made in favour of centralisation. First, there is an economies of scale argument to shift powers to a higher legal order that has competence to deal with the externality over a larger territory. This corresponds with the basic insight that if the problem to be regulated crosses the borders of competence of the regulatory authority, the decision making power should be shifted to a higher regulatory level, preferably to an authority which has jurisdiction over a territory large enough to deal with the problem adequately.²² "Economic theory provides a straightforward but unrealistic answer to

21 A major American supporter of this "presumption in favour of decentralisation" is *Revesz*. See, e.g., R. *Revesz*, Environmental Regulation in Federal Systems, in: H. Somsen (ed.), Yearbook of European Environmental Law (2000), 1; and R. *Revesz*, Federalism and Environmental Regulation: An Overview, in: R. *Revesz*/P. Sands/R. Stewart (eds.), Environmental Law: The Economy and Sustainable Development (2000), 37.

22 Compare: *Ogus*, (1999) ICLQ 414 and C. *Kimber*, A Comparison of Environmental Federalism in the United States and The European Union, (1995) 54 Maryland LR 1; D. *Esty*, Revitalizing Environmental Federalism, (1996) 95 Michigan LR 625; and *Rose-Ackerman*, Rethinking (Fn. 10), 164 f.

regional problems: draw 'optimal' jurisdictional boundaries".²³ This "economies of scale" argument is thus related to the argument that transaction costs will be lower if regulation is made at the higher level.²⁴ There is, however, another argument in favour of centralisation which relates to the fact that in cases of transboundary externalities states would have no incentive to impose stringent regulations upon their own citizens if the consequences of harmful actions were only felt outside their own territories. Transboundary externalities thus may create inefficiencies in the absence of central regulation.²⁵

This argument in favour of centralisation could therefore play a role with respect to transboundary torts. Thus, as we shall argue below, many have proposed central decision making in the areas of environmental liability and product liability, since these areas of tort law are typically transboundary in nature. However, this externality argument obviously cannot provide a general justification for the harmonisation of rules of tort law as long as accidents are confined within national borders. Moreover, as we shall show below, by focusing more specifically on environmental liability and product liability, even with these typical transboundary torts one should not move too hastily to centralisation, since there may be remedies within national law as effective in dealing with these transboundary problems.

Moreover, *Van den Bergh* has demonstrated that in some cases, more particularly in the area of private law, European law cannot be considered an effective remedy to the interstate externality problem.²⁶ In some cases European law goes further than is necessary to cure transboundary externalities; in other cases less comprehensive legal instruments than total harmonisation could be used to remedy the problem.²⁷ There is, in other words, always the risk that the cure may be worse than the disease. The first issue relates to the fact that European Directives often cover both local and community-wide problems, such as pollution, without making a distinction between regional and interstate pollution.²⁸ The second point is that in some cases transboundary externalities may also be internalised by national law. The simple fact of transboundary effects is therefore not sufficient to justify European law making.²⁹ Nevertheless, there certainly may be cases where one could hold that decentralised legal rule making would not be able to remedy the transboundary externality.

This shows indeed that in cases of transboundary torts there may be an argument in favour of centralisation, but only if there is indeed a serious risk that nation states would be able to externalise harm, in other words if the nation states were able to throw the negative effects of their own actions on the shoulders of their neighbours. Moreover,

23 So *S. Rose-Ackerman*, *Controlling Environmental Pollution: The Limits of Public Law in Germany and the United States* (1995), 38.

24 It is thus related to the "transaction cost" argument, to be discussed below.

25 See, for the "interstate externalities" and "economies of scale" justifications for centralisation, *Revesz*, *Federalism* (Fn. 21), 67.

26 *Van den Bergh*, *MJECL* 1998, 143.

27 *Van den Bergh*, *MJECL* 1998, 144 f.

28 So *R. van den Bergh*, *Economics in a Legal Strait-Jacket: The Difficult Reception of Economic Analysis in European Law*, paper presented at the workshop *Empirical Research and Legal Realism: Setting the Agenda*, Haifa, 6-9 June 1999, 10.

29 *Van den Bergh*, *MJECL* 1998, 144 f.

European harmonisation would then have to be limited to transboundary torts. The transboundary externality argument indeed provides no justification for a harmonisation of tort law which merely deals with "national torts". Finally, it would have to be clear that national legal remedies cannot provide an adequate answer to the problem posed by interstate torts.

Let us now examine how these arguments apply to two typical transboundary torts: environmental harm and product liability.

2. *Example: environmental liability*

a) *"Economy of scale" argument*

This argument in favour of centralisation could play a role with respect to environmental problems. It can certainly be argued that these are often transboundary.³⁰ The transboundary character of an externality is, within the European context, obviously an important argument for decision making at the European level. Indeed, many environmental problems cross national borders. A great many of the environmental directives fit into this economic criterion for community action. These include the regulation of the international transport of waste,³¹ as well as many other directives that regulate pollution of a transboundary character.³²

The most important (economic) reason for community action with respect to the environment is therefore probably not the often-stated argument of the harmonisation of conditions of competition,³³ but simply the transboundary character of the pollution problem to be regulated. Many of the environmental directives indeed deal with pollution problems which cross the borders out of one single Member State. They can therefore be justified under this first economic criterion. This obviously does not necessarily imply that the contents of every directive on this point have been effective, nor that the instruments used to cure transboundary pollution have always been optimal.

b) *Alternative solutions?*

However, there have been warnings that the argument that centralised powers are necessary to deal with transboundary problems should not be accepted too easily.

First, *Esty* and *Geradin* have powerfully argued against an "all or nothing" approach, meaning either all power with the local authorities or shifting all power to the central level. They have argued that transboundary pollution problems can be dealt with through legal instruments other than centralisation, in other words by instruments which

30 See, equally, *Oates/Schwab*, (1988) 35 JPE, who also argue that as long as the effects of pollutants are confined within the borders of the relevant jurisdictions, local authorities will make socially optimal decisions in respect of environmental quality.

31 Regulation 259/93 of 1 February 1993 OJ 1993, L 30.

32 This is certainly also the case for Directive 76/464 on the Discharge of Dangerous Substances into the Aquatic Environment. For other examples, see *R. Van den Bergh/M. Faure/J. Lefevre*, The Subsidiarity Principle in European Environmental Law: An Economic Analysis, in: *E. Eide/R. Van den Bergh* (eds.), *Law and Economics of the Environment* (1996), 131 f.

33 This will be discussed below.

do not involve a change of the national environmental laws of a particular country.³⁴ One possibility is the external application of high-standard (domestic) laws. Another is the national enforcement of domestic laws with cross-border monitoring. In other words: the transboundary character of the externality may be an argument for co-operation, but not necessarily for homogeneity of legal rules. However, *Esty* and *Geradin* admit that these alternative approaches have serious limitations as well and might not be effective remedies in all cases.³⁵

Second, *Cohen* argued that Coasean bargaining between the polluting and the victim state may lead to negotiated agreements between them.³⁶ Therefore, *Cohen* argues that there is no a priori reason to centralise regulatory decision making.³⁷ There might, however, be several reasons why the ideal solution from *Coase's* world might not be possible as a solution to transboundary pollution problems, for example in the case of transboundary rivers such as the Rhine or the Meuse. First, *Coase* assumes that property rights are clearly defined.³⁸ Although there are some indications in international environmental law on this point, it might not be certain what the legal rule is: the right to pollute or the polluter pays. This uncertainty concerning the assignment of property rights might endanger negotiations. Second, adequate information is needed both on the consequences of pollution and on the possible abatement techniques³⁹ and, third, there may be no strategic behaviour. Finally, parties need to be able to enforce a negotiated agreement. In that respect the EC framework might have several advantages. The EC offers an institutional framework that provides legal instruments to enforce an agreement. Moreover, the EC regulatory framework might fix the property rights. Also, the fact that Member States within the EC framework are repeat players (one who injures today may be a victim tomorrow) may prevent the risk of strategic behaviour. Looking at the practice of transboundary pollution in Europe, one may argue that indeed the EC approach has achieved far better results so far than all the attempts at bilateral agreements. EC directives on (transboundary) pollution of waters provided Dutch victims of Belgian pollution of the river Meuse with a powerful tool to force the Belgians to introduce pollution abatement,⁴⁰ a result which could probably never have been achieved

34 See *D. Esty/D. Geradin*, Environmental Protection and International Competitiveness. A Conceptual Framework", JWT 32/3 (1998), 5; and see *D. Esty/D. Geradin*, Market Access, Competitiveness and Harmonization: Environmental Protection in Regional Trade Agreements, (1997) 21 Harvard ELR 265, in which they provide an interesting overview of the various legal instruments to deal with harmonisation and apply this in the NAFTA and in the European context. See also *M. Trebilcock/R. Howse*, Trade Liberalization and Regulatory Diversity, Reconciling Competitive Markets with Competitive Politics, EJLE 6 (1999), 5.

35 *Esty/Geradin*, JWT 32/3 (1998), 34.

36 See also *Van den Bergh*, Economics (Fn. 28).

37 *M. Cohen*, Commentary, in: *Eide/Van den Bergh*, Environment (Fn. 31), 167-171.

38 Which *Cohen* (Fn. 37), 168 f., mentions as well.

39 *Cohen* (Fn. 37), 168.

40 See *M. Pâques*, Effet direct du droit communautaire, interprétation conforme et responsabilité de l'Etat en général et en matière d'environnement, in: *J. van Dunne* (ed.), Non-Point Source River Pollution: The Case of the River Meuse (1996), 89. See for the case of the river Rhine, *J. van Dunne*, Transboundary Pollution and Liability: The Case of the River Rhine (1991).

through the interminable negotiations between the two countries.⁴¹ Thus, the EC has undoubtedly played an important role as far as providing remedies against *transboundary* pollution is concerned.

c) Applied to environmental liability

In some cases the EC considers the transboundary character of a problem as a sufficient justification for centralised rule making without differentiating between local and transboundary pollution⁴². Moreover, many of the environmental directives also deal with relatively "local" problems that do not cross national borders. This seems to be the case for environmental liability also. Many pollution cases giving rise to liability are confined within the borders of one country. Moreover, even if there is transboundary pollution, other remedies could be applied (for example through international private law) that do not go as far as total harmonisation. Note that this "transboundary externality" argument is a totally different one in the product liability case, since the likelihood of products affecting international trade is obviously quite large.⁴³ For environmental liability there would only be a case for centralisation if the central rules were to apply exclusively to transboundary pollution and even then the question would arise as to whether this problem could not be remedied by less comprehensive means. However, the European environmental liability regime as proposed in the White Paper on environmental liability supposedly applies to "damage to biodiversity", which is not necessarily transboundary in character. The question therefore arises whether other economic reasons can be found for European environmental liability legislation in those cases where the effects of pollutants are confined within the borders of the relevant Member States, for example in the case of soil pollution.⁴⁴

d) Critique of the White Paper on Environmental Liability

In the White Paper on Environmental Liability the European Commission advances several criteria in favour of centralised environmental liability rules. As I have just mentioned, the White Paper proposes a European framework to be applied solely to damage to biodiversity and soil pollution, both of which are typically local pollution problems. The question therefore arises how the European Commission deals with the externality argument in favour of centralisation.⁴⁵

The first argument of the Commission deals with transboundary damage. It is held in the White Paper that Member States cannot effectively address cross-border pollution. Indeed, as the literature on federalism indicates, the *Tiebout* model will not yield

41 Note, however, that some results have also been achieved as a result of multilateral Coasean bargaining. See *Van den Bergh*, *Kyklos* 53 (2000), 452 f.

42 See for instance Directive 74/464, which regulates discharges of dangerous substances into the aquatic environment for both transboundary rivers and local ponds.

43 See *R. M. Ackerman*, *Tort Law and Federalism: Whatever Happened to Devolution?*, (1996) *Yale LPR* 429; *G. T. Schwartz*, *Considering the Proper Federal Role in American Tort Law*, (1996) 38 *Arizona LR* 917; and *Faure*, *Kyklos* 53 (2000), 467.

44 The regime as proposed in the White Paper typically applies to soil pollution.

45 Arguments relating to other criteria will be discussed below. For an integrated discussion of the White Paper on Environmental Liability from a subsidiarity perspective, see *Faure/De Smedt*, (2001) *EL* 217.

effective results if cross-border externalities are not adequately addressed. In the case of cross-border externalities, the EC and not the separate Member States should have jurisdiction.⁴⁶ This cross-border rationale, however, provides an explanation for only part of the EC environmental legislation, as the EC acknowledges implicitly: “the Union’s current policies extend far beyond air and water quality to include the protection of soils, habitats and fauna and flora, and the conservation of wild birds”.⁴⁷

However, if cross-border harm is a serious problem in the EC though Member States can adequately deal with pollution within their borders, then according to the subsidiarity principle, an EC liability regime would only be justified for cross-border environmental harm instead of one dealing with environmental damage of all kinds. This would result in a so-called “transboundary only” regime. In this respect, liability for environmental damage is different from other areas of tort like product liability. Products cross borders all the time, but habitats stay where they are.⁴⁸ Moreover, according to *Bergkamp* cross-border externalities by themselves do not necessarily require a harmonised liability regime: “additional regulatory initiatives or more effective enforcement mechanisms might cure these as well”.⁴⁹ Indeed, case law in many Member states has been developed in order to allow an extraterritorial application of domestic law on cross-border pollution. These jurisprudential developments may thus cure cross-border externalities without the need for total harmonisation of environmental liability.

Summarising, transboundary environmental pollution can occur in certain cases in the EU. However, this argument by itself is not sufficient for a fully harmonised liability regime in the EU. Other remedies may cure this problem. Moreover, even if harmonisation were to be considered a preferred legal instrument, it could justify a European “transboundary only” regime but not total harmonisation.

Another argument dealt with by the Commission in the White Paper is the principle of equal treatment. Equal treatment is discussed in the White Paper in the context of the transboundary externalities argument.

As was just indicated, economic theory suggests that if interstate externalities are a reason for centralisation, the European directive need not necessarily cover both local and community-wide pollution.⁵⁰ This idea of a “transboundary only” regime was discussed, but explicitly rejected by the Commission, since it was held that this could lead to inequalities in the treatment of victims in Member States depending on whether they were the victims of transboundary or local pollution.⁵¹ Nevertheless this White Paper on environmental liability shows that the Commission (at least as of 9 February 2000) seems to be aware of the arguments advanced in the economic literature in favour of (de)centralisation and discusses them.

Strikingly, the White Paper – at least implicitly – discusses the criteria advanced by economic analysis for centralisation at the European level (more particularly the trans-

46 *L. Bergkamp*, The White Paper on Environmental Liability, (2000) EELR 107.

47 www.europa.eu.int/pol/env.info.en.htm.

48 *Bergkamp*, (2000) EELR 107.

49 *Bergkamp*, (2000) EELR 107.

50 *Van den Bergh* suggests that a distinction should be made between regional and interstate pollution (*Van den Bergh*, Economics (Fn. 28)).

51 White Paper on Environmental Liability, 25 f.

boundary character of environmental pollution and the "harmonisation of conditions of competition" arguments) and rightly focuses on the fact that these arguments would theoretically lead to a preference for a "transboundary only" regime. The White Paper, however, rejects this approach on the basis of the equality arguments mentioned above.

Bergkamp indicates that when referring to equality, the Commission no longer argues within the scope of the subsidiarity principle, but simply pleads for uniformity.⁵² As will be shown below,⁵³ this argument could fit into the public choice theory which holds that industry (supported by green NGOs) in heavily regulated (and probably polluted) areas lobbies to force their very stringent environmental regulations upon other Member States that might not need such stringent measures. In that way, this industry might cause artificial barriers to entry to be erected.

Yet the subsidiarity principle has been included in the EC Treaty precisely to prevent European action from being justified mainly on the basis of a request for uniformity, possibly by industry in heavily regulated areas.⁵⁴ As mentioned above, the subsidiarity principle allows the community to take action if and only in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States. As it is not proven that uniformity is necessary for the Member States in order to deal effectively with environmental damage, there is no need for full harmonisation. The equality argument is therefore not very convincing, neither from an economic nor a legal perspective.

3. *Example: product liability*

As we have just mentioned, the externality argument in favour of centralisation traditionally plays an important role with respect to environmental problems.⁵⁵ The argument goes in favour of centralisation with respect to transboundary environmental problems. However, the question arises how this "transboundary externality" argument relates to a tort area like product liability. One can certainly argue that the product liability area is a totally different one from the traditional tort as far as the potential for affecting international trade is concerned. The chance that "normal" tort might have an interstate effect is, with a few exceptions (like the transboundary pollution case, mentioned before), relatively small, whereas, given mass production, products nowadays are seldom meant just for the domestic market. Indeed, as *Schwartz* has argued in the American context, the imperatives of mass production require a manufacturer to sell the same product throughout the federal nation, so that the need for uniformity in state product liability law seems huge.⁵⁶ For the same reason *Ackerman* argues that product liability is in principle a good candidate for federal law.⁵⁷ These arguments, however, mainly amount to the point that uniformity in product liability law would "come in handy" in the American context;⁵⁸ they do not explain why the mere fact that products

⁵² *Bergkamp*, (2000) EELR 107.

⁵³ In IV.

⁵⁴ *Bergkamp*, (2000) EELR 107.

⁵⁵ See *Oates/Schwab*, (1988) 35 JPE 333; and *Van den Bergh*, MJECL 1998, 140.

⁵⁶ *Schwartz*, (1996) Arizona LR 924.

⁵⁷ *Ackerman*, (1996) Yale LPR 451.

⁵⁸ And might therefore fit into the transaction cost argument, to be discussed below in this section at 4.

cross national borders would constitute the risk that states would be able to shift external costs to others.

Indeed, the starting point for the analysis remains, as *Van den Bergh* rightly points out, that different communities in the Member States may have different preferences concerning both the level of product safety and product liability law. The fact that these differing preferences lead to differing legal solutions should in principle, as was discussed above, be considered as a benefit instead of a problem.⁵⁹ He therefore argues that a problem only arises if, say, a producer in the Netherlands were to produce products which comply with the Dutch (supposedly low) product liability and product safety standards and export them to, say, Belgium and France, where (again supposedly) the required level of product safety would be much higher. In this hypothesis a “trans-boundary externality” problem would only arise if the consumers in Belgium and France had no possibility of filing a lawsuit against the Dutch manufacturer. This problem is, however, not very realistic, since the victims would in this case be the French and Belgian citizens who presumably have a higher product liability standard, which could then be applied to the Dutch manufacturer. In other words, manufacturers of defective products are generally liable to damages for harm suffered in export markets.⁶⁰

Of course, the fact that in the example the manufacturer is located in the Netherlands while the products are marketed in Belgium and France and the harm is suffered equally in those countries may lead to a few practical problems for victims; but these problems do not necessarily immediately justify central regulation, with the corresponding loss of differentiated regulation according to preferences. First of all, choice of law regimes may be used to guarantee, for example, that the French and the Belgians can have their (supposedly higher-standard) product safety and product liability law applied. This, however, is criticised by *Schwartz* who points out the fact that in this example the court in, say, France will apply high standard French law on the Dutch manufacturer. The effect therefore is that the Dutch manufacturer will be confronted with the higher-standard French law. From this *Schwartz* implies that a regime of state product liability law is inconvenient as a means for expressing state values. In the view of *Schwartz*, France would express its sovereignty by subordinating the sovereignty of the Netherlands through the application of French law.⁶¹ Still, it can hardly be seen how this argument can justify central regulation. The effect of the choice of law regime is precisely that the Dutch manufacturer will not be able to externalise harm by shifting it only to export markets. Of course this presumes that a system is in place which allows the Belgian and French victims to sue the Dutch manufacturer. But this is, in the European context, precisely provided through the (recently revised) European Convention with respect to the jurisdiction and execution of judgements of 1968. Of course one should be aware that even with this convention it might still remain difficult for victims to recover losses in another state.⁶² This practical problem, however, cannot be remedied

⁵⁹ *Van den Bergh*, MJECL 1998, 133 f.

⁶⁰ So *Van den Bergh*, MJECL 1998, 141.

⁶¹ *Schwartz*, (1996) Arizona LR 931 f. and 937-941.

⁶² See *R. Kirstein/A. R. Neunzig*, Internationale Zuständigkeit von Gerichten und die Anerkennung ausländischer Urteile, in: K.-E. Schenk/D. Schmidtchen/M. E. Streit/V. Vanberg (eds.), *Jahrbuch für neue politische Ökonomie, Globalisierung und Rechtsordnung* (1999), 345.

by harmonisation. It is indeed not differences in legal rules that cause difficulties in the transboundary enforcement of claims, but different rules of civil procedure in the Member States.

In sum, the mere fact that different states would hold different preferences with respect to product liability and product safety and that therefore different regimes would exist, can as such hardly be considered as an argument for centralisation as long as states are not capable of externalising harm to victims in third countries. A problem might in that respect exist, so *Van den Bergh* has argued, only if the rules of the import country do not allow a full internalisation because the injurer may escape the payment of damages. *Van den Bergh* gives the example of a situation where a state would not allow recovery in tort in cases of causal uncertainty, meaning that the manufacturer could not be held liable unless the victim could prove "beyond reasonable doubt" that the particular manufacturer caused his loss. A problem could, according to *Van den Bergh*, also arise if a legal system would not allow the recovery of non-pecuniary losses.⁶³ In those cases there would be loopholes in the national product liability law of the importing state which would indeed allow exporting manufacturers to externalise harm. This, however, assumes that, for example, the decision not to compensate non-pecuniary losses would lead to the inefficient use of resources⁶⁴ and would not be a reflection of national values and the preferences of the citizens.

4. *Example: medical malpractice*

If we now turn to a liability situation which is in principle confined within national borders, it seems pretty obvious that the transboundary externality problem does not play a role there. Take the example of medical malpractice.

As far as health care and medical malpractice is concerned, one can argue that in principle citizens should be free to choose the medical malpractice system which corresponds optimally to their preferences, since they will finally pay the price for such a medical malpractice system. The provision of health care in principle takes place at the local level and has very few extraterritorial effects. The problem that may arise is that patients "escape" to another country where they can get health care faster (or better). These issues are, however, a reason to harmonize social security, but not necessarily medical malpractice. The transboundary character of an externality cannot be advanced as a justification for harmonization of liability rules concerning medical malpractice.

Hence, we can be relatively brief with respect to medical malpractice, at least as far as this first criterion for centralisation is concerned. Medical malpractice is in this respect just one example of the many other categories of accidents which are confined within national borders and have no transboundary effects. An argument sometimes heard in this respect is that there might nevertheless be a transboundary effect concerning say, citizens from Germany, Belgium or the Netherlands travelling to Southern Europe and becoming the victims of a traffic accident. However, the fact that Greek law (for example) would then be applied to that accident, even if it involves foreign nationals, does not mean that Greece would be able to externalise harm. Hence, the mere fact

⁶³ *Van den Bergh*, MJECL 1998, 142.

⁶⁴ Which is not necessarily the case. We come back to that argument below.

of tourism does not constitute an argument for centralisation, at least from an economic perspective.

II. The race for the bottom

1. General: the risk of destructive competition

There may be an economic argument for centralisation, in that there is a risk that a “race for the bottom” would emerge between countries to attract foreign investments. As a result of this, prisoner’s dilemmas could arise, whereby countries would fail to enact or enforce effective legislation. Centralisation can be advanced as a remedy for these prisoner’s dilemmas. This race-for-the-bottom argument could in theory play a role in the case of product safety as well.⁶⁵ It would mean that local governments would use lenient environmental legislation as a competitive tool to attract industry.⁶⁶ The result would be an overall reduction of environmental quality below efficient levels. This should correspond with the traditional game theory result that prisoner’s dilemmas create inefficiencies.

The race-for-the-bottom argument has had supporters as well as opponents in North American scholarship. Law and economics scholars tend to stress the benefits of competition between states and point out the dangers of centralisation,⁶⁷ whereas some legal scholars tend to attach more belief to the race-for-the-bottom rationale for centralisation.⁶⁸

As we will indicate below this race-for-the-bottom argument has not as such been explicitly discussed in the European legal debate. It only shows up in the argument that the conditions of competition should be harmonised. That will be discussed below. From an economic perspective the race for the bottom is only a rationale for centralisation if it can be established that states could attract industry with lenient tort rules.⁶⁹ Let us examine, again with a few examples, whether that is a realistic scenario.

2. Example: environmental liability

a) Is there a risk of a race for the bottom?

In American legal and economic scholarship environmental problems are sometimes discussed within the framework of this race-for-the-bottom rationale. In Europe these issues are rarely discussed in those terms but in terms of the European community dogma of “levelling the playing field to avoid distortions of competition”. This somewhat confuses the debate.⁷⁰ The “harmonisation of conditions of competition” argument could either be interpreted narrowly in “race-for-the-bottom” terms or more broadly as a

65 For a detailed discussion of this argument, see *Esty/Geradin*, JWT (1998), 16-19.

66 Compare *Rose-Ackerman*, Rethinking (Fn. 10), 166-170.

67 See *R. Revesz*, Rehabilitating Interstate Competition: Rethinking the Race for the Bottom Rational for Federal Environmental Regulation, (1992) NYU LR 1210 and *R. Revesz*, Federalism and Interstate Environmental Externalities, (1996) U Pennsylvania LR 2341.

68 See *Esty/Geradin*, (1997) 21 Harvard LR 265 and JWT 32/3 (1998), 5.

69 See *Van den Bergh*, *Kyklos* 53 (2000), 445.

70 For a critical approach, see *R. Van den Bergh*, Economic Criteria for Applying the Subsidiarity Principle in European Environmental Law, in: *Revesz/Sands/Stewart*, *Environmental Law* (Fn. 21), 80.

general argument to harmonise all kinds of rules and standards. The latter is the usual interpretation in Europe. Before discussing this harmonisation-of-conditions-of-competition argument, let us now first focus on the race-for-the-bottom risk.

From an economic perspective, differences in the conditions of competition only pose a problem if it is clear that environmental costs would be considerably different between the Member States and that these differences would lead to the relocation of firms to the Member State with the lowest standards.⁷¹ In that case, the so-called race-for-the-bottom argument, in environmental cases referred to as the "pollution haven" hypothesis, might be an argument in favour of centralisation.⁷² The question therefore arises whether there is empirical evidence that states can indeed attract industry by lenient environmental standards.

b) Empirical evidence of pollution havens

Empirical evidence to uphold this race-for-the-bottom rationale is rather weak. *Repetto* argues that pollution control costs are only a minor fraction of the total sales of manufacturing industries.⁷³ Moreover, *Jaffe/Peterson/Portney/Stavins*⁷⁴ argue that empirical evidence shows that the effects of environmental regulations are "either small, statistically insignificant or not robust to tests of model specification". They argue that the stringency of environmental regulations might have some effect on new firms in their decision to locate for the first time,⁷⁵ but that this will not induce existing firms to relocate. They equally argue that other criteria such as tax levels, public services and the unionisation of the labour force have a much more significant impact on the location decision than environmental regulation. Recently this empirical evidence has been somewhat contradicted by *Xing/Kolstad*,⁷⁶ who argue that the laxity of environmental regulations in a host country is a significant determinant of foreign direct investment by the US chemical industry. The more lax the regulations, the more likely the country is to attract foreign investment, so *Xing/Kolstad* argue. Although this somewhat weakens the evidence presented by *Jaffe/Peterson/Portney/Stavins* as far as the location of new firms outside the US is concerned, it does not contradict their finding that existing firms will not relocate solely because of the stringency of environmental regulations.

Arguments against the race-for-the-bottom rationale for central environmental regulation have also been formulated with respect to the American example. Many schol-

71 See equally *Revesz*, who argues that given the weaknesses of the "harmonization of conditions of competition" argument "it is not surprising that recent European scholarship has sought to recharacterise the quest for harmonization in race to the bottom terms" (*R. Revesz*, *Federalism and Regulation: Some Generalisations*, in: D. Esty/D. Geradin (eds.), *Regulatory Competition and Economic Integration, Comparative Perspectives* (2001), 29).

72 Although *Esty* and *Geradin* have rightly pointed out the fact that a whole variety of legal instruments exists which may remedy the problem, whereby the total harmonization of standards would be the most far reaching (*Esty/Geradin*, (1997) 21 *Harvard ELR* 282).

73 *R. Repetto*, *Trade and Sustainable Development*, UNEP, Environment and Trade Series (1994).

74 *A. Jaffe/S. Peterson/P. Portney/R. Stavins*, *Environmental Regulation and the Competitiveness of US Manufacturing: What Does the Evidence Tell Us?*, (1995) 33 *JEL* 132.

75 See *Esty/Geradin*, *JWT* 32/3 (1998), 12-15.

76 *Y. Xing/C. D. Kolstad*, *Do Lax Environmental Regulations Attract Foreign Investment?*, 16-95 (Working Paper in Economics, University of California, 1995).

ars,⁷⁷ among them *Revesz*⁷⁸ in particular, have argued that this race-for-the-bottom argument finds no support in existing models of interjurisdictional competition. In addition, *Revesz* stresses that central standard setting would not be an effective response to the race-for-the-bottom problem, since the local communities concerned would have other means to attract industry if they wish (relaxation of regulatory controls in other areas). *Revesz* has encountered opposition, especially from *Esty*,⁷⁹ but he has provided a powerful reply to his critics.⁸⁰

This material, therefore, weakens the prisoner's dilemma argument. Moreover, it has also been argued that as far as environmental standards are concerned, it is not at all clear that there will be a race for the bottom. There is also some evidence that Member States do in fact strive for high environmental standards, even if this puts extra costs or burdens on their industries. Some countries may therefore be more involved in a race-for-the-top instead of a race-for-the-bottom⁸¹. One could also question whether European law is at all able to remedy a real race-for-the-bottom risk, given the enforcement deficit.

c) *Is there a race-for-the-bottom in environmental liability?*

All these arguments apply to the area of environmental liability as well. It is doubtful whether within Europe Member States would be able to engage in a game in which they would strive for low level environmental liability in order to attract industry. There is no proof of such a destructive competition towards lower liability standards and this risk is, moreover, not very realistic. Indeed, as indicated, it is doubtful whether environmental liability plays a significant role in attracting or repulsing business to or from a given state. Other elements may be far more important than the level of environmental liability in the location decisions of businesses. Moreover, if environmental liability were to have any effect as far as the race for the bottom is concerned, it is even more likely that states would wish to protect victims of environmental pollution instead of corporate interests. Indeed, lenient environmental liability legislation may well run counter to the states' interests since it would limit the possibilities, for example, of recovering soil reclamation costs from liable polluters. If there is any effect at all one can therefore expect a race-for-the-top rather than a race-for-the-bottom in the area of environmental liability. This would enable states to recover, for example, costs for the reclamation of (domestically) polluted soils from foreign polluters too.

77 See e.g. *S. Pelzman/T. Tideman, Local v. National Pollution Control: Note*, (1972) AER 959; and *E. D. Elliott/B. Ackerman/J. Millian, Towards a Theory of Statutory Evolution: The Federalization of Environmental Law*, (1985) JLEO 313.

78 *Revesz*, (1992) NYU LR 1210 and *Revesz*, (1996) U Pennsylvania LR 2341.

79 *Esty*, (1996) 95 Michigan LR 570.

80 *R. Revesz, The Race for the Bottom and Federal Environmental Regulation: A Response to Critics*, (1997) Minnesota LR 535.

81 So *Van den Bergh/Faure/Lefevere* (Fn. 32), 141 f. *Ogus* argues that there may be benefits to firms from being located in a high standard Member State, since this may generate technological improvements and thus competitive advantages; that may explain the race-for-the-top (*Ogus*, (1999) 48 ICLQ 415). See, generally, *D. Vogel, Trading Up: Consumer and Environmental Regulation in the Global Economy* (1995), 13 f.

3. *Example: product liability*

The race-for-the-bottom argument could also in theory play a role in the case of product safety.⁸² It would mean that local governments would compete with lenient product-safety regulation to attract industry.⁸³ The result would be an overall reduction of product safety below efficient levels. This should correspond with the traditional result of game theory that prisoner's dilemmas create inefficiencies.

The basic idea behind this argument, applied to product liability, would be that product liability law may impose costs on industry. If governments fear these costs greatly and would prefer to favour national industry they could do so by lowering product standards. If lowering product standards were a way to attract industry, distortions could occur which would justify centralised decision making.

There are, however, some weaknesses in the application of this argument to the area of product safety. First of all, product liability and product safety law may effectively create costs for manufacturing industry but, as was explained in the economic analysis,⁸⁴ these costs can often be passed on to the purchasers of the product.⁸⁵ Second, as far as the liability of a producer in the sense of the Product Liability Directive (being the manufacturer) is concerned, it is also difficult for states to take part in a race-to-the-bottom for the simple reason that the harm may well occur in another state. Imagine, again, that France would like to attract industry with a lenient product liability regime. In doing so it can hardly attract manufacturing industries that largely depend upon an export market. Their exposure to product liability will indeed depend upon the legislation applicable in the state where the harm will occur. It is therefore, especially as far as the liability of manufacturers is concerned, unlikely that states would engage in a race-for-the-bottom to attract industry.⁸⁶

This shows that the theoretical basis for a race-for-the-bottom risk in cases of product liability is relatively weak.⁸⁷ This argument would only justify centralisation if it could be proven that without centralisation a risk of destructive competition would indeed emerge.⁸⁸ There is no proof of such a destructive competition towards lower product safety standards and this risk is, moreover, not very realistic.⁸⁹ Indeed, it is doubtful whether the law of tort and, more particularly, product liability play a signifi-

82 For a discussion, see *Van den Bergh*, MJECL 1998, 136-139.

83 Compare *Rose-Ackerman*, Rethinking (Fn. 10), 166-170.

84 For an economic analysis of product liability, see P. Burrows, Products Liability and the Control of Product Risk in the European Community, (1994) OREP 68; and F. Silva/A. Cavaliere, The Economic Impact of Product Liability: Lessons from the US and the EU experience, in: G. Galli/J. Pelkmans (eds.), Regulatory Reform and Competitiveness in Europe, I, Horizontal Issues (2000), 292.

85 *Van den Bergh*, MJECL 1998, 137-139.

86 See *Ackerman*, (1996) Yale LPR 458, and *Van den Bergh*, MJECL 1998, 139.

87 *Van den Bergh*, MJECL 1998, 136 f.

88 In the words of *Susan Rose-Ackerman*: "If state and local laws seem designed to protect local business rather than reflect genuine differences in tastes across jurisdiction, the federal government should take a hard look to determine the possible interference with interstate commerce" (*Rose-Ackerman*, Rethinking (Fn. 10), 173).

89 *M. Faure*, Aktuelle Regulierungspraxis bei Heilwesenschäden in Europa mit Ausblick auf die EG-Rechtsharmonisierung (1998), 46 f.

cant role in attracting or repulsing businesses to or from a given state. Other elements, such as labour conditions, the amount of direct government regulation and taxes may be far more important than the level of product liability in the location decisions of businesses.⁹⁰ Moreover, if product liability were to have any effect as far as a race for the bottom is concerned, it is even more likely that states would wish to protect accident victims instead of corporate interests. Consumer advocates may call this a “race for the top”, although a system whereby foreign manufacturers are penalised with overprotective product liability law may well be considered inefficient and in that (reverse) sense a race towards the bottom.⁹¹

4. *Example: medical malpractice*

Returning to the example of an area of tort law where the consequences of accidents are usually confined within national borders, such as medical malpractice, it can certainly be argued that many differences exist between national laws in that area.⁹²

However, from an economic point of view, differences between legal rules are only a problem when a single state would be able to attract industry from another state with very low, inefficient standards. In that case a race-for-the-bottom would occur, whereby all enterprises would wish to escape to this low standard country. This could then be remedied through centralised standard setting. That argument does not seem to play a serious role in either the area of health care or medical malpractice. This race-for-the-bottom fear would only lead to an argument in favour of centralisation if one could argue that there is a serious risk that health care providers, for example, would escape to states with an overly flexible medical malpractice regime. This does not seem very likely since the location decision of health care providers is obviously not only influenced by the medical malpractice regime, but also by other factors such as the price to be paid for medical services and the social security regime.

III. *Harmonisation of marketing conditions*

1. *General*

a) *The race for the bottom versus a common market*

This race-for-the-bottom argument, that competition among jurisdictions for economic activity will be “destructive”, corresponds – to some extent – with the European legal argument that the creation of harmonised conditions of competition is necessary to avoid trade distortions. This argument was traditionally used to harmonise legislation of the Member States in a variety of areas. Simply stated, the argument is that complying with legislation imposes costs on industry. If legislation is different, these costs would therefore differ as well and the conditions of competition within the common market would not be equal. The argument apparently assumes that total equality of conditions of competition is necessary for the functioning of the common market. “Levelling the playing field” for European industry remains the central message.

90 Ackerman, (1996) Yale LPR 459.

91 Ackerman, (1996) Yale LPR 458; and Schwartz, (1996) Arizona LR 932.

92 See M. Faure/H. Koziol (eds.), *Cases on Medical Malpractice in a Comparative Perspective* (2001).

There are, however, some problems with this traditional European argument which in fact claims that any difference in legislation between the Member States might endanger the conditions of competition and therefore justifies harmonisation of legal rules. The latter argument seems particularly weak.⁹³ From an economic point of view, the mere fact that conditions of competition differ does not necessarily create a race-for-the-bottom risk. There can be differences in marketing conditions for a variety of reasons, and if the conditions of competition were indeed totally equal, as the argument assumes, there would also be no trade.

Also, Europe has developed an elaborate set of rules which guarantee – *inter alia* – a free flow of products and services⁹⁴ and thus contribute to market integration without the necessity of harmonising all rules and standards.⁹⁵ In this context, the case law of the European Court of Justice with respect to the free movement of goods versus environmental protection springs to mind.⁹⁶ This shows that the goal of market integration can be achieved through (other) less comprehensive instruments than total harmonisation,⁹⁷ which can remove barriers to trade just as effectively. Hence, one should make a distinction between the political ideal of creating one common market in Europe on the one hand and the (economic) race-for-the-bottom argument on the other hand.⁹⁸ This political goal of market integration may be questioned on economic grounds⁹⁹ and may justify the need for rules aiming at a reduction of trade restrictions such as, for example, the harmonisation of product standards.¹⁰⁰ The problem is that initiatives such as those in the area of environmental law also aim at the harmonisation of process standards “to harmonise conditions of competition”. That seems questionable on efficiency grounds.¹⁰¹ What can be said about this harmonisation of the conditions of competition argument?

b) “*Levelling the playing field*”

It should be stressed that the European argument that markets will be distorted without the harmonisation of the conditions of competition is not only constantly repeated in a stereotypical way, but its validity is hardly ever questioned. The argument as it is usually presented in Europe, cannot, as was stated above, be fitted into the eco-

93 See also J. Spier/O. A. Haazen, The European Group on Tort Law (“Tilburg Group”) and the European Principles of Tort Law, ZEuP 1999, 478.

94 See Art. 28-30 of the Treaty (the “old” Art. 30-36).

95 See generally on the potential conflict between free trade and environmental protection, D. Esty, Economic Integration and the Environment, in: N. Vig/R. Axelrod (eds.), The Global Environment: institutions, law and policy (1999), 190.

96 For an overview of this case law, see J. Lefevere/M. Faure, Introduction to European Environmental Law, in: T. Kegels (ed.), Shipping Law Faces Europe: European Policy Competition and Environment (1995), 93-107; and Trebilcock/Howse, (1998) EJLE 21-28.

97 See also Esty/Geradin, (1997) Harvard ELR 296-299 and A. Ogus, Regulation, Legal Form and Economic Theory (1994), 177-179.

98 See also Revesz, who equally argues that these are separate points which should be distinguished, (Revesz (Fn. 71), 19).

99 See Van den Bergh, Economics (Fn. 28).

100 These were the result of directives issued as a consequence of the so-called “Single Market Initiative”.

101 This is also criticized by Revesz (Revesz (Fn. 71), 19).

conomic criteria for centralisation, since it suggests that removing any difference in legal systems would be necessary to cure the race-for-the-bottom risk, which is neither supported by economic theory, nor by empirical evidence. Also even if one were to take the (political) “common market” goal as a starting point and tort law were to be harmonised on that ground, this would still not create a level playing field since differences in, for example, energy resources, access to raw materials and atmospheric conditions will still lead to marketing conditions that favour trade.¹⁰²

There is, in addition, a strong counter-argument, in that there are many examples showing that economic market integration is possible (without the distortions predicted by the race-for-the-bottom argument) with unstandardised legal orders. Public choice scholars have often advanced the Swiss federal model as an example where economic market integration goes hand in hand with differentiated legal systems.¹⁰³ It is apparently possible to create a common market without the total harmonisation of all legal rules and standards. That is not to say that there may not be other arguments in favour of the harmonization of tort law in Switzerland. Notably the reduction-of-transaction-costs argument – to be discussed below – may well constitute a powerful reason to prefer one Federal Swiss tort law instead of 26 different cantonal systems. Therefore, clear steps towards harmonisation of tort law can be seen in Switzerland as well.¹⁰⁴ Note, however, that this is not because harmonisation would be necessary to make market integration possible.

2. *Example: environmental liability*

In discussing the argument about the “harmonisation of marketing conditions” above we have made it clear that, from an economic perspective, this is valid only if the differences in market conditions were to lead to a race-for-the-bottom risk. However, we have made it equally clear that this argument is rather weak, given the fact that other legal rules than total harmonisation can be used to encourage market integration.

These arguments therefore weaken the rationale of the harmonisation-of-marketing conditions in the area of environmental liability as well. The European argument that any difference in legal rules between the Member States would endanger market integration and that therefore a harmonisation of law is needed in order to harmonise conditions of competition is too general, too unbalanced and not supported by economic theory. Differences between the legal systems of Member States may, from an economic point of view, constitute a problem if this would result in an inefficient race for the bottom. But the empirical evidence available suggests that this may not be a serious risk in the environmental field. Even if differences in the stringency of environmental law exist between Member States, this will generally not lead companies to relocate to “pollution havens” within Europe. The least one can argue is that if the European Commission were to use a race-for-the-bottom rationale for centralisation, it should prove that without centralisation in the specific field a risk of destructive competition

102 So *Van den Bergh*, *Economics* (Fn. 28), 6.

103 *B. Frey*, *Direct Democracy: Politico-Economic Lessons from Switzerland*, (1994) *AER* 338.

104 See *B. Wininger*, *L'architecture de l'Avant-projet de loi sur la responsabilité civile*, *RDS* (2001), 299; and see *H. Kozioł*, *Das niederländische BW und der Schweizer Entwurf als Vorbilder für ein künftiges europäisches Schadenersatzrecht*, *ZEuP* 1996, 592 f.

would emerge.¹⁰⁵ The debate in Europe has, so far, never focused on that question,¹⁰⁶ since it has always been argued that any harmonisation of legal rules was necessary to achieve market integration, which obviously confuses the debate.

The same applies to the area of environmental liability. It is indeed easily possible to create a common market without a total harmonisation of all the legal rules. The goal of market integration would not necessarily be achieved through this comprehensive instrument of total harmonisation. This would only justify, for example, general safety standards aiming at avoidance of pointless incompatibilities which could create barriers to trade and distortions of competition within the internal market. The latter argument, however, cannot justify the harmonisation of the rules of private law such as environmental liability. Finally, attempts which have been undertaken so far to harmonise the rules of private law, such as in the area of product liability, have not been able to achieve a total harmonisation of marketing conditions.

3. *Example: product liability*

a) *Product safety versus product liability*

The harmonisation of the conditions-of-competition argument has obviously played an important role in the area of product liability and, as we will show below, it has even been used explicitly as (one of the) rationales for the European Product Liability Directive. In the product liability debate one could often hear the traditional argument that uniform rules in Europe are necessary to guarantee the free movement of goods within the EC. What can be said about this argument?

A difference should probably be made in this respect between product safety standards on the one hand and product liability rules on the other hand. It could be argued that differences in product safety standards may indeed endanger interstate trade. Therefore rules with respect to – inter alia – a free flow of products and services may certainly contribute to the European goal of market integration. The Product Safety Directive 52/59 of 29 June 1992 aims clearly at removing differences in safety standards, since the Commission considers that these differences might endanger the establishment of the internal market. The preamble reads:

“Whereas it is important to adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992; whereas the internal market is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is insured;

105 In that case there may seriously be a valid argument for intervention by Brussels. Compare - in the US context - the remark by *Rose-Ackerman*, *Rethinking* (Fn. 10), 173: “If state and local laws seem designed to protect local business rather than reflect genuine differences in tastes across jurisdictions, the federal government should take a hard look to determine the possible interference with interstate commerce”.

106 See equally *D. Esty*, and *D. Geradin*, who argue that the risk of a regulatory race for the bottom for environmental reasons has not been a major issue in the EC (*Esty/Geradin*, (1997) 21 *Harvard ELR* 308).

Whereas some Member States have adopted horizontal legislation on product safety, imposing in particular, a general obligation on economic operators to market only safe products;
Whereas those legislations differ in the level of protection afforded to persons;
Whereas such disparities and the absence of horizontal legislation in other Member States are liable to create barriers to trade and distortions of competition within the internal market”.

Where the preamble to the Directive of 29 June 1992 on general product safety therefore clearly states that disparities and the absence of horizontal legislation in other Member States are liable to create barriers to trade and distortions of competition within the internal market, this is probably true. However, the question arises whether the goal of market integration can only be achieved by means of an instrument as comprehensive as total harmonisation and, more particularly, there is also the question whether this may justify the harmonisation of rules of private law, such as product liability. Indeed, the political goal of market integration may justify the need for some rules aiming at the reduction of trade restrictions (think about the case law of the European Court of Justice with respect to the free movement of goods) and may justify a minimum harmonisation of product standards in the framework of the single market initiative. In that respect the directive on general product safety in fact only provides for a general obligation to place only safe products on the market, but safety standards may still be drawn up in the Member State in which the product is in circulation or may rely on codes of good practice, which need not necessarily be European.¹⁰⁷

Ogus is relatively enthusiastic about these product safety directives, precisely because the harmonisation is limited to “essential safety requirements”. To meet these requirements the Member States can still use their national standards, whereby voluntary standards set by expert committees will allow for an easy mutual recognition. The approach chosen in the product safety directives therefore even promotes competition between different national and European standards systems, so *Ogus* holds.¹⁰⁸

The goal of “levelling the playing field” is much more apparent in the Product Liability Directive. That directive is clearly justified on the ground that differing liability rules in the Member States would hamper the conditions of competition. The considerations preceding the directive read:

“Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market”.

The weakness of this argument is that it assumes that differences in marketing conditions are always and necessarily a problem for the creation of a common market. Conditions of competition are obviously never equal, as the levelling-the-playing-field

¹⁰⁷ See Art. 4 (2) of the Directive 92/59 of 29 June 1992 on general product safety.

¹⁰⁸ *Ogus*, Regulation (Fn. 97), 177-179.

argument assumes. In the ideal case of totally equal market conditions, there would be no trade. This political goal of market integration may moreover be questioned on economic grounds.¹⁰⁹ Also, as has been mentioned above, even a total harmonisation of product liability would not lead to the creation of a level playing field. In addition, reference may again be made to the Swiss example to show that a common market may exist even without a total harmonisation of rules and standards.¹¹⁰

Finally, "the proof of the pudding is in the eating". The question can therefore be asked whether the European Product Liability Directive, as it has been drafted, can indeed achieve a total harmonisation of marketing conditions.

b) Product Liability Directive: harmonisation?

Let us now have a brief look at the contents of the Product Liability Directive of 1995 to analyse whether this directive is capable of creating legal certainty and achieving full harmonisation, which is necessary to realise the proclaimed "harmonisation of marketing conditions".

The European Product Liability Directive had two goals:¹¹¹ first, it aims at creating equal marketing conditions to "avoid distortions of competition". Second, it wishes to achieve a high level of consumer protection. Both goals can, within the focus of this paper, be rephrased in economic terms. The question whether the Product Liability Directive actually leads to harmonisation is obviously useful in judging the desirability of European action in the first place. If the directive had been able to create full harmonisation of product liability, it might have saved transactions costs (see below) to such an extent that they might have outweighed the advantages of differing product liability laws.

The question which therefore should be asked is whether the justification given in the considerations preceding the directive, i.e. that the existing divergences in law before the Product Liability Directive may have distorted competition and affected the movement of goods within the common market, is actually correct. It is undoubtedly correct to argue that before 1985 there were different product liability regimes in the Member States, but the question arises whether these differences were so important that they "may (have) distort(ed) competition and affect(ed) the movement of goods within the common market", as the Product Liability Directive argues. A Dutch author, *Van Wassenae van Catwijck*, has indicated that although the product liability regimes did indeed differ, insurance premiums to cover the product liability risk were not substantially different. If that is true, the differences in market conditions were probably not as large as the Commission holds. More important is obviously the question of whether the directive in the 1985 version could reach the harmonisation goal at all. It is in fact very unlikely that this is the case.¹¹²

109 See for a critical analysis *Van den Bergh*, Economics (Fn. 28).

110 See equally *R. Revesz*, Federalism and Environmental Regulation: lessons for the European Union and the International Community, (1997) Virginia LR 1338.

111 See on the goals of the Directive also *A. J. O. van Wassenae van Catwijck*, Products liability in Europe, (1986) Am J Comp L 793 f.

112 Almost all authors agree on that point. See *H. D. Tebbens*, De Europese Richtlijn Produktaansprakelijkheid, NJB 1986, 373 f.; *P. Storm*, Een gebrekkig produkt, Maandblad voor Ondernemingsrecht,

Indeed, according to Art. 13 all the different, already existing, product liability laws remain in effect, which means differences that already exist will remain unchanged. In addition, at many points the directive itself refers to national legislation, for example, with respect to the rights of contribution or recourse (Art. 5 and 8 (1)), with respect to non-material damage (Art. 9), the suspension or interruption of the limitation period (Art. 10 (2)) and with respect to nuclear accidents (Art. 14). It should also be mentioned that in three cases the directive expressly allowed the Member States to derogate from the provisions of the directive – namely liability for primary agricultural products, liability for development risks and the introduction of a financial limit on liability. Moreover, the directive cannot of course bring any harmonisation for all the product accidents to which it does not apply, because of limitations in the definitions of “product”, “producer” and “damage”. Many notions in the directive are also unclear and can give rise to interpretation problems.¹¹³ These interpretation problems can be solved by the European Court of Justice in Luxembourg. But it often takes a long time before an interpretation problem is brought before the Court and as long as there is no definitive solution, these interpretation problems of unclear notions in the directive might again endanger the harmonisation objective. Interpretational problems are all the more likely in practice since even the language differences of the various translations of the directive can lead to different interpretations of the same provision.¹¹⁴ It has already been mentioned that the Product Liability Directive gave several options to the Member States, concerning the inclusion of primary agricultural products, the liability for development risks and the possibility of introducing a financial limit on liability. This has obviously also caused differences, as just indicated. These differences, as far as the implementation of the directive into domestic law is concerned, are shown in annex 1 to the Green Paper on liability for defective products.¹¹⁵

Although it is clear that this Product Liability Directive cannot approximate to the Member States legislation, this has been used as an argument to give the EC competence in this matter.¹¹⁶

There are other inconsistencies that are worth mentioning in an evaluation of the effectiveness of the directive. Both the introduction of the 10 year limitation period and the optional introduction of a financial limit on liability have been defended by referring to the introduction of liability for development risks. In the final version the producer is

TVVS 1985, 245; A. J. O. van Wassenae van Catwijk, Produktaansprakelijkheid, in: Serie Praktijkhandleidingen, Zwolle (1986), 81; and M. M. Casals/J. S. Feliu, Responsabilidad por productas en España y (des)armonización Europea, (2001) 4 RRCS 1.

113 Cf., e.g., the notion of “defect” in Art. 6.

114 See for instance the different meaning of the “lower threshold” of Art. 9 in the French and the Dutch version. Another example is that in the English text producer liability is called a “liability without fault”, whereas in the Dutch version it is just “liability”. For other examples see M. Faure/W. Vanbuggenhout, Produktaansprakelijkheid: De Europese richtlijn: harmonisatie en consumentenbescherming, RW 1987-1988, 1-14 and 33-49.

115 Green Paper on Liability for Defective Products, COM (1999), 396 final.

116 Art. 100 of the EEC treaty indeed gave legislative competence to the community in order to harmonize the different legislations of the Member States. It was, however, heavily debated whether this Art. 100 was an appropriate basis on which to ground the legislative power of the EC with respect to product liability (see L. Krämer, EEC Consumer Law, in: Droit et Consommation, 1986, 274 f.).

in principle not liable for development risks, but nevertheless the limitation period as well as the optional financial limit remained in place. In addition one notices that the directive is said to introduce a "liability without fault", but nevertheless the conduct of the producer will still be important, for example, when the defectiveness of a product is assessed and with respect to the notion of defect. So, in fact, the fault notion still plays a role in establishing whether there is liability under the directive.

For all these reasons some authors qualify the directive itself as a defective product.¹¹⁷

From this it follows that the product liability directive still relies to a considerable extent on national law and can for that reason never lead to a "levelling of the playing field" or a "harmonisation of marketing conditions". The example of the European Product Liability Directive therefore nicely shows that the harmonisation-of-the-conditions-of-competition argument is not a useful basis for European action towards centralisation.

4. *Example: medical malpractice*

Finally, let us analyse how the argument that differences between national legal orders would lead to differences in market conditions, which might endanger the creation of a common market, applies to "national torts" such as medical malpractice. The "harmonization of conditions of competition" argument was, as was just mentioned, the basis for European intervention in the field of product liability. This idea assumes that all differences in legal rules would endanger market integration. However, as mentioned, from an economic point of view differences between legal rules are only a problem when a single state would be able to attract industry from another state with very low inefficient standards. In that case a so-called "race to the bottom" would occur, whereby all enterprises would wish to escape to this low standard country. This could then be remedied through centralised standard setting. However, that argument does not seem to play a serious role in either the area of health care or medical malpractice. This race-to-the-bottom fear would only lead to an argument in favour of centralisation if one could argue that there is a serious risk that, for example, health care providers would escape to states with an inefficiently flexible medical malpractice regime. This does not seem very likely since the location decision of health care providers is obviously not only influenced by the medical malpractice regime, but also by other factors such as the price to be paid for medical services and the social security regime.

In sum: from an economic point of view differences between legal systems as far as medical malpractice is concerned should not necessarily lead to inefficiencies. These differences may well be useful, since they may correspond with different preferences of the citizens. It is possible that the citizens in, say, Germany have a preference for a relatively strict medical malpractice regime with high compensation, but are also willing to pay the corresponding price (either in health care services directly or via the tax system) whereas citizens in, say, the United Kingdom might not have a demand for such a strict medical malpractice regime because they would not be prepared to pay the corresponding price. If these different preferences explain some of the differences between the

117 This is the title of the article by Storm, TVVS 1985, 241.

legal systems, why then should Europe harmonise medical malpractice and force either the Germans to come down to the UK level, or the UK to come up to the German level?

Hence, the conclusion is that the differences found are not necessarily bad from an economic point of view. In addition, it could be argued that for health care providers too these differences in legal regime are not necessarily problematic. For health care providers it is obviously important to be able to move freely between Member States. Free movement is, however, hardly affected by differing medical malpractice regimes, but much more by the regulation of health care in general, and for example, the mutual recognition of diplomas.¹¹⁸

IV. Reduction of transaction costs

1. General

There may, however, be one final economic argument in favour of harmonisation, based on the reduction of transaction costs.¹¹⁹ This argument is often advanced by European legal scholars pleading for harmonisation of private law in Europe, and is based on the belief that differences in legal systems are very complex and only serve Brussels law firms.¹²⁰ This argument cannot be examined in detail here.¹²¹ It is obviously too simple to state that a harmonised legal system is always more efficient than differentiated legal rules because of the transaction cost savings inherent in harmonised rules.¹²² The argument neglects the fact that there are substantial benefits from differentiation whereby legislation can be adapted to the preferences of individuals.¹²³ Moreover, given the differences between the legal systems (and legal cultures) in Europe the costs of harmonisation may be huge – if not prohibitive – as well.¹²⁴ The crucial question therefore is whether the possible transaction cost savings of harmonisation outweigh the benefits of differentiated legal rules. There is little empirical evidence to support the statement that transaction cost savings could justify European harmonisation of all kinds of legal rules. Moreover, the transaction cost savings are likely to be relatively small.¹²⁵

However, this reduction of transaction cost argument is probably the most important justification for several initiatives (mostly at the private academic level) that have

118 See in that respect, *H. Schneider*, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft* (1995).

119 A somewhat related but different argument relates to economies and diseconomies of scale in administration, see *Rose-Ackerman*, *Rethinking* (Fn. 10), 165 f.

120 This is one of the arguments made by the Danish scholar *Lando* in favour of harmonized private law: *O. Lando*, *Die Regeln des Europäischen Vertragsrecht*, in: P.-C. Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (1993), 473 f.

121 It is further developed and criticised by *Van den Bergh*, *MJECL* 1998, 129-152.

122 Compare *Rose-Ackerman* (Fn. 10), 172, who argues that uniform federal regulation may reduce search costs and tends to produce a more stable and predictable jurisprudence.

123 See, for the environmental case, *R. Mendelsohn*, *Regulatory Heterogeneous Emissions*, (1986) *JEEM* 301.

124 That point has especially been made by *P. Legrand*, *The impossibility of legal transplants*, *MJECL* 1997, 111.

125 So *Van den Bergh*, *MJECL* 1998, 146-148.

been taken towards a harmonisation of tort law. The crucial question in that respect is obviously whether differences between legal systems are, as *Legrand* for one suggests, so heavily rooted in legal culture and legal tradition that one should consider these differences as reflecting differing preferences of the citizens or whether they merely concern pointless incompatibilities that do not at all reflect differences in value patterns. Again, here one needs to differentiate between the various areas of tort law under consideration. If it were possible, for example, to demonstrate that in most European legal systems strict liability is only used for hazardous activities and activities related to them and that basically a fault/negligence regime still applies to non-hazardous activities, then one could argue that while there are differing formulations of the strict liability rule, citizens have in fact similar preference patterns.¹²⁶ Such a legal issue would then be a good candidate for harmonisation on the basis of the transaction cost reduction. But again, it would still have to be examined whether the differences in the legal techniques used in the various legal systems to describe the strict liability regimes can indeed be bridged at relatively low costs. Otherwise, the marginal costs of harmonisation may once again be higher than the benefits. Indeed, as was mentioned above, it is relatively difficult to argue that there are any benefits at all, other than that it would be easier for lawyers from various Member States to deal with tort rules in other Member States. But, given the (probably relatively low) benefit of harmonisation, the costs of harmonisation should therefore be even lower, which may obviously be questionable.

In the introduction we have argued that in this harmonisation effort (on the basis of transaction cost reduction) economic analysis of tort law may again play an important role. If it were indeed possible (also with the use of law and economics) to show that differences between legal systems merely concern legal form and technique but not differing values and preferences, harmonisation might be achieved at relatively low costs. However, it remains a matter of empirical evidence whether the harmonisation costs will indeed be that low, even in areas where preferences do not differ that much.

Take the example of the negligence regime. Although the economic issue that the judge has to deal with in negligence cases is probably pretty similar all over Europe (checking whether the behaviour of the defendant comes up to a required standard of care), there seem to be huge differences in the legal techniques to reach this result.¹²⁷ One may, from a economic (some would argue naive) perspective argue that since the task of the judge in all of these negligence cases is always rather similar it should be possible to lay down common rules on how the judge should set a standard of due care and weigh the behaviour of the defendant in all of these negligence cases, thereby doing away with the various legal techniques used in the Member States.¹²⁸ One may then argue that the benefits would be that it would be a lot easier for legal practitioners, for

126 I am certainly not arguing that this would indeed be the case. The experiences of the various "harmonization groups" have exactly demonstrated that considerable differences still exist as far as the scope of application of strict liability regimes is concerned. See, e.g., B. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002).

127 On these differences, see *inter alia* H. Koziol (ed.), *Unification of Tort Law: Wrongfulness* (1998).

128 On all of these differing legal techniques, see C. von Bar, *The Common European Law of Torts*, vol. II (2000), 201-332.

example, to practise in other countries.¹²⁹ However, it would be rather naive to assume that all these differences merely concern technicalities (which may be right from an economic perspective). Given the fact that they are so heavily rooted in the legal system the costs of harmonisation may again be huge. Some have already pointed out these difficulties in the literature.

However, here again “the proof of the pudding is in the eating”. If it were possible to harmonise at relatively low costs, for example, the cases where strict liability or the application of the negligence standard is appropriate this may be considered as a benefit. However, harmonisation attempts so far (which we will discuss below) should not lead to great optimism in this respect.¹³⁰

Moreover, one should always be careful that the transaction cost reduction argument does not disregard differences in preferences. In other words, if the current differences between the tort rules of various legal systems do indeed merely consider technical differences that do not reflect differing preferences of citizens, the transaction cost reduction argument may be valid. One should then still be careful that, for example, in the area of negligence only the way that due care standards are set and that the judge weighs the behaviour of the injurer are harmonised and not, for example, the contents of the due care standard itself. What is required of a tortfeasor, such as a physician in a medical malpractice case, may well be different in Portugal from what it is in Sweden. Again, here it cannot be argued that these differences are merely pointless technicalities: they can actually be linked to differing preferences. Hence, the transaction cost reduction argument may lead to centralisation, but not necessarily to harmonisation.¹³¹ This would mean that if it were possible at all at a relatively low cost, for example, to define how judges should deal with the negligence standard, that issue could be centralised, but the specific contents of the due care standard could still be left to national judges. This shows that, as has already been mentioned often in the economic literature, centralisation should not necessarily lead to complete harmonisation. Centralisation of the negligence standard, in this example, may well be combined with a differentiation of the specific contents of this standard, by still relying on national judges. Thus one could gain by lowering transaction costs (assuming that this were possible) and still have the benefit of respecting differing preferences.

There are, moreover, probably areas in tort law where the differing preferences are much stronger than the reduction of transaction cost benefits. Take the example of the amounts awarded for non-pecuniary losses. Many have argued that there are still considerable differences between the Member States in that respect. However, it is relatively difficult to argue that these differences themselves lead to huge economic problems. Again, one could argue that these differences reflect differing national preferences and hence there seems to be no point in favour of harmonisation there. In this case the

129 Again, it should be argued that these benefits should not be overstated, since other legal rules may restrict the freedom to exercise their profession in other countries.

130 See, however, the first results of the harmonisation attempt by the Study Group on a European Civil Code, presented by C. von Bar, *Konturen des Deliktsrechtskonzeptes der Study Group on a European Civil Code*, ZEuP 2001, 515-532.

131 A. Arcuri, *Controlling Environmental Risk in Europe: the complementary Role of an EC Environmental Liability Regime*, TMA 2001, 41 f.

differences are probably not just differences in legal technique and can therefore not be reduced to pointless incompatibilities. It is therefore difficult to see any transaction cost benefit from harmonisation there, whereas the disadvantages (in terms of not respecting national preferences) under harmonisation would be huge. From an economic perspective there would, hence, not be an argument to harmonise, say, the specific amounts awarded in the various cases of non-pecuniary losses.¹³²

But it should be again stressed that the transaction cost reduction argument is much more powerful, anyway, than the argument about the harmonisation of marketing conditions, which has been used by Europe so far to justify its harmonisation efforts in the area of private law. However, it remains an empirical question whether the transaction costs corresponding with the current differences between the legal systems are indeed higher than the transaction costs of harmonisation. Let us look at a few examples more closely.

2. *Example: environmental liability*

To address the question of whether the regime proposed in the White Paper on environmental liability could achieve a reduction of transaction costs one would have to assess whether it can create a uniform regime and provide a legal certainty which would reduce transaction costs. That is highly doubtful.

Indeed, there is one particularly worrying point concerning the regime proposed in the White Paper which may endanger uniformity and increase transaction costs. This has to do with the balanced approach chosen in the White Paper which may make a future liability regime highly complex. A scheme provided in the White Paper itself makes clear that the proposed regime is not only very balanced, but also very complex. Indeed, as the summary shows the applicable regime will depend not only upon the type of damage (traditional damage, contaminated sites or damage to biodiversity) but also upon the type of activity (dangerous or not). Moreover, the White Paper argues that it focuses on damage to biodiversity, since most existing Member States' environmental liability regimes would not cover that type of damage. The question, however, arises whether that is generally true: Member States certainly have rules on traditional damage and contaminated sites.¹³³

This entails, therefore, a risk of increased legal complexity, which could lead to cases whereby different legal regimes (different European and national regimes) would apply to various types of damage, resulting from a single pollution case. That would obviously create legal uncertainty and so would endanger the reduction of transaction costs.

To a large extent, this is due to the fact that until now the White Paper has not addressed the question of how the different regimes proposed should be combined if, for example, a non-dangerous activity causes damage to the soil, to human health and to biodiversity as well. A future regime should definitely clarify how these (European and national) rules apply to specific cases if there is really a desire to reduce transaction costs.

¹³² We come back to the harmonisation of non-pecuniary losses in this paragraph under 5.

¹³³ For an overview, see R. Seerden/K. Deketelaere (eds.), *Legal Aspects of Soil Pollution and Decontamination in the EU Member States and the United States* (2000).

3. *Example: product liability*

The transaction costs argument may also play an important role in justifying the coordination of product safety standards to prevent states from hindering the free flow of products and services.¹³⁴ Indeed, some co-operation between states seems necessary if a product is mass produced and internationally distributed to avoid interstate trade being hampered as a result of varying national product safety standards.¹³⁵ Indeed, also in international trade law it is well-known that divergent health, safety and related regulatory standards between countries of origin and countries of destination, especially in cases where these standards are more stringent in the country of origin than in the countries of destination, provoke allegations by the countries of origin that they are subject to discrimination in the countries of destination. This might result in a violation of GATT regulations and regulatory harmonisation will therefore occur to minimise product incompatibilities so that producers have maximum access to export markets. Harmonisation is therefore certainly useful to avoid pointless incompatibilities which do not reflect different preferences.¹³⁶ These transaction costs arguments do therefore apply in the field of economic regulation and product safety. Indeed, the information required to formulate these rules may be useful for the whole of Europe and the formulation of uniform rules in these cases may save on information costs and can, hence, promote interstate trade. Therefore, once more, the Directive on General Product Safety, taken in the framework of the 1992 programme to establish the internal market, may well be considered as an instrument which saves transaction costs.¹³⁷

The question, however, arises whether these transaction cost savings as a result of harmonised rules can also be expected for product liability. One could argue that a manufacturer who markets his products across the whole of Europe would, in the absence of harmonisation, need specialised legal counsel in every state and that his insurance underwriters would have to calculate the liability exposure separately in accordance with each state's product liability law.¹³⁸ This argument, however, as mentioned above, neglects the fact that there is a benefit in differentiated liability rules that reflect varying preferences. Moreover, the cost of harmonisation in the field of private law (with deep roots in legal culture) may be huge and the alleged transaction cost savings may be less than expected. Indeed, even in the case of a harmonised legal rule, manufacturers would still need local counsel to bring their cases to court. Accordingly, economies of scale under a harmonised rule would probably be insignificant.¹³⁹ Here again "the proof of the pudding is in the eating", so that the question arises of whether the European Product Liability Directive has been able to create the legal certainty required, reducing transaction costs for manufacturers.¹⁴⁰

134 See generally *Vogel*, *Trading Up* (Fn. 81), 52-55.

135 *Schwartz*, (1996) *Arizona LR* 924 f.

136 *Trebilcock/Howse*, (1998) *EJLE* 21 and 30.

137 *Van den Bergh*, *MJECL* 1998, 145 f.

138 *Ackerman*, (1996) *Yale LPR* 453.

139 So *Ackerman*, (1996) *Yale LPR* 453, footnote 135.

140 *Van den Bergh* rightly points to lots of interpretation problems in the European Product Liability Directive which backs up the conclusion that the transaction cost savings may be small, simply

Above we have looked more closely at the Product Liability Directive and have argued that, given its dependence on national law, it can never lead to a harmonisation of marketing conditions. The Product Liability Directive in fact adds an additional layer of complexity to the labyrinth of conflicting standards of liability. It can therefore never lead to uniformity or a lowering of transaction costs.¹⁴¹

Obviously this, and the fact that there are many other weaknesses of the Product Liability Directive, is well known to the European Commission itself.

Precisely for that reason the Product Liability Directive provided for a review every five years "in fact to proceed towards greater harmonisation with a view to establishing a regulatory framework which is as comprehensive, coherent, balanced and effective as possible for protecting victims and ensuring legal certainty for producers".¹⁴² This five year review has resulted in a green paper of the Commission launched on 28 July 1999, which is addressed to the larger European business and consumer community with two aims:

- i. It allows information to be gathered which will serve to assess the directive's application in practice in the experience of those concerned (in particular industry and consumers) and to establish definitely whether the directive is achieving its objectives;
- ii. Reaction to it may reveal what would be the most sensitive points of this legislation in the event of a revision.¹⁴³

The Commission wishes to promote reflection and debate and therefore invites replies based on facts. Obviously the Commission has indicated guidelines for discussion concerning all of the important topics in the product liability area, such as the existence of financial limits, the 10 year deadline, the burden of proof, the assessment of the insurability of risks, the suppliers' liability and the type of goods and damage covered. Although the green paper clearly states that it does not prejudge the Commission's position in these areas, the fact that a lot of topics which were previously highly criticised are now put on the agenda for possible reform is interesting in the light of the analysis provided in this paper.

Interesting in that respect are, inter alia:

- The fact that the financial limit on liability is put on the agenda for possible reform. There has been a call to increase the option for a ceiling to EUR 140 million, but the question is also asked whether the existence of any financial limit is strictly justified.¹⁴⁴
- The Commission is also asking the question whether the producers need to be required to have insurance cover for risks linked to production. Currently the

because a full harmonisation of the rules of private law is apparently difficult to achieve (*Van den Bergh*, MJECL 1998, 146 f.).

141 See *Ackerman*, (1996) Yale LPR 454.

142 Green Paper on Liability for Defective Products, 11.

143 See Green Paper on Liability for Defective Products, 2.

144 Green Paper on Liability for Defective Products, 26.

product liability Directive does not require producers to have any kind of financial cover. Economic analysis indicated that strict liability with insolvency may create inefficiencies, so that this question certainly merits attention.

- The question is also raised as to whether product liability under the Directive should be extended to suppliers. So far, the Product Liability Directive, with a few extensions, has only applied to manufacturers. In that respect the criticism has been formulated in the literature that if retailers are excluded from the product liability regime, the Directive cannot be considered as an appropriate means to cure a race-for-the-bottom risk as discussed above.

It is interesting that some of the issues which were criticised from an economic perspective are now open to possible review. From a normative perspective it can, of course, be hoped that the European Commission has taken the lessons from economic analysis into account.

As a result of the Green Paper, the European Commission received about a hundred comments from national and European consumer organisations, industry associations and public administrations of Member States. On the basis of all those reactions, the Commission drafted a second report. Indeed, according to Art. 21 of the Directive, the Commission is supposed to report on the application of the products liability Directive to the council. A first report on the application of the Directive of 13. 12. 1995 (COM (95) 617) simply concluded that there was too little information available on the application of the Directive, so that the Commission did not consider it appropriate to submit any proposals for amendments. On the basis of the aforementioned Green Paper, the Commission published a second report on 31. 01. 2001 (COM (2000) 893 final).

One of the striking conclusions of this report is that the Product Liability Directive is seldom applied in practice. The number of product liability cases seems to be low in general; the number of cases handled on the basis of the Directive must be even lower.

In this report, the Commission also discusses the question as to whether all the issues which were announced for revision in the Green Paper should be reformed or not. The conclusions in that respect are astonishing. After the Commission has discussed all the reactions and suggestions for revision (report, pp. 13-27), it concludes only that, at this moment, too little information is available for any reform. Thus it would be premature to envisage any changes to the current liability system under Directive 85/374.

However, several follow up measures are suggested for the short and medium term. One of these issues is that any review should start with "whether greater harmonisation between the different liability systems currently existing would be advisable and, if this was the case, what means would be feasible" (report, p. 30). It is striking that, once more, the Commission only examines whether more harmonisation might be advisable, and does not address the more relevant question: whether the lack of practical importance of the directive means that *less* harmonisation might be desirable.

4. *Example: medical malpractice*

The same result can be reached in the area of medical malpractice. Indeed, one could simply ask the question of whether it would be at all practical to harmonise medi-

cal malpractice. Comparative analysis has shown that similar cases may lead to very different outcomes in the different legal systems.¹⁴⁵ This applies both as far as the finding of liability is concerned and with regard to the amount of damages if liability is found. However, the reasons for the varying outcomes of specific cases are often very different. In most cases it is relatively clear whether in a particular case there is negligence on the side of the health care provider or not.¹⁴⁶ In other words, most legal systems do not differ that much on the applicable standard of care and, when the facts are clear, on the question of whether that standard was breached in a particular case or not. More often there are differences as far as the burden of proof and, particularly, the issue of causation is concerned.

This shows that it may make little sense to harmonise in medical malpractice, for example, the standard of care, since that is apparently not the area where most legal systems differ. Moreover, if the standard of care were to be harmonised, the outcome might still be different because of differences of a procedural nature (burden of proof) or differences as far as dealing with causal uncertainty is concerned.

Moreover, the final outcome (i.e. what a victim really receives as compensation) is obviously not only determined by the amounts awarded, but equally by the social security system. Comparative analysis shows that especially as far as the amounts awarded are concerned, there are major differences between the European legal systems. Moreover, the compensation paid to a victim of medical malpractice is still primarily defined by the social security system, at which level there is as yet no harmonisation. This shows that harmonisation solely addressing the issue of medical malpractice would be totally ineffective. As long as the social security systems still differ considerably, the amounts awarded to victims will also be different. Thus, it would not lead to actual harmonisation if Europe only sought to harmonise, for example, the standard of care to apply to cases of medical malpractice.

Finally, it is important to stress that medical malpractice should not be viewed independently from general tort law. To achieve some form of harmonisation, it seems wiser to try to harmonise the general principles of tort law first and only to move to medical malpractice in a subsequent step.

The inevitable conclusion therefore is that the harmonisation of medical malpractice at the European level, considered in isolation from tort law, does not seem to be practicable. It does seem very useful, however, to examine whether common principles may be found which constitute the "roots" of European tort law. But until such an exercise has been carried out, legal systems with a far-reaching regime of medical malpractice, such as Germany, will simply have to pay the price of the comprehensive protection awarded to victims of medical malpractice.

145 Faure/Kozioł, *Medical Malpractice* (Fn. 92).

146 This is of course not surprising, since it often depends on the opinion of experts to decide whether there was negligence or not.

V. *Minimum level of protection*

1. *General*

We will now leave the economic criteria for harmonisation and address the question whether other, non-economic arguments can be advanced in favour of the harmonisation of tort law. Thus, we leave economic reasoning and enter the political arena, where obviously all kinds of arguments may be advanced in favour of harmonisation. This is a difficult and slippery road and therefore I only want to be brief here. Some may indeed argue that it is not economic arguments that demand the harmonisation of tort law in Europe but, for example, the desire to provide a minimum level of protection to accident victims in the whole of Europe. Indeed, one also has the impression that a movement such as that in favour of a European civil code is inspired more by political idealism than by economic arguments. Nevertheless some comment is possible on the idea that there should be a harmonisation of tort law to guarantee a minimum level of protection to the citizens of Europe, more particularly to accident victims. The idea has sometimes been advanced in the area of environmental policy.

There is indeed an important legal or policy argument to be mentioned in this respect that may conceivably lead to centralisation. It has to do with the idea of guaranteeing all European citizens a similar environmental quality. This is sometimes referred to as the protection of the "European environmental and cultural heritage and human health". If this argument is accepted at the policy level, it could be used to harmonise environmental quality. It is, however, important to note that the reason for centralisation in such a case would not then be the economic need for market integration, but the ecological desire to guarantee all citizens within the EU a similar, or at least basic, environmental quality. The consequence would then be that, contrary to economic logic, it would not be the preferences of citizens that would prevail, but the policy desire to provide one basic environmental quality in Europe.¹⁴⁷ This corresponds with the point made by *Ogus* that the preferences of citizens for lower standards at lower costs may sometimes be overruled if it is held that these low standards would infringe widely held perceptions of human rights.¹⁴⁸ In the environmental context this point could take the form of guaranteeing all citizens a basic environmental quality.¹⁴⁹

On paper this idea of guaranteeing a minimum quality to European citizens sounds very nice. However, one should then realise that, as will be argued below, a minimum level of protection will be imposed upon citizens, even if this does not correspond with their preferences. Economists may argue that this amounts to paternalism. Moreover, economists have also pointed out that European policy so far has never aimed at provid-

¹⁴⁷ Compare *D. Esty*, who argues in favour of global environmental norms requiring a behavioral minimum (*Esty*, (1996) 95 Michigan LR 570). More critical is *Revesz* (Fn. 71), 3-29.

¹⁴⁸ "Rights may, in this instance, justifiably 'trump' efficiency": *Ogus*, (1999) 48 ICLQ 418. See also *Cohen* (Fn. 37), 170, who calls for centralised minimum quality standards for reasons of "equity, justice, or pure paternalism" and *R. Stewart*, who states that geographically uniform standards ensure every individual a minimum healthy environment even though such uniformity is economically inefficient (*R. Stewart*, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, (1977) 86 Yale LJ 1196, and *R. Stewart*, *Environmental Regulation and International Competitiveness*, (1993) 102 Yale LJ 2039).

¹⁴⁹ See explicitly *Kimber*, (1995) 54 Maryland LR 1690.

ing a basic quality of life for all European citizens. If that were a political desire it would of course have been far more important to provide, for example, minimum social security, basic health care and harmonisation in the area of minimum wages. Those areas are traditionally still very sensitive; they are related to national sovereignty and Europe has not intervened in them yet. It would therefore be rather strange to enact a uniform tort law on the basis that European citizens should receive adequate protection when such minimum protection is not provided for more basic needs.

Moreover, it is questionable whether tort law itself is an appropriate instrument to provide this minimum level of protection. The human rights arguments for harmonisation may be quite valid, but it is difficult to see how they may be applied to the area of tort law.¹⁵⁰ Moreover, one may argue that other instruments, based on the European Convention on Human Rights, would be more appropriate to provide this minimum level instead of the top-down harmonisation approach followed by the European Union.

Finally, it is also questionable whether the different levels in tort law today are serious enough to support the proposition that in some Member States the minimum level of protection to be guaranteed to its accident victims has not been provided.

In sum, even the political argument in favour of a (total) harmonisation of tort law (or, indeed, even in favour of a minimum level) is rather weak. This can be shown once more by looking at a few examples:

2. *Example: environmental liability*

a) *Economic approach: differentiation according to preferences*

From an economic point of view, there is no reason for centralisation if the externalities are local and no prisoner's dilemmas exist. This economic argument in favour of differentiation according to the preferences of citizens is not only valid for a question such as whether or not a Greek turtle should be protected at the European level.¹⁵¹ It is also valid for the whole body of environmental law, and even for environmental liability standards. This corresponds with the *Tiebout* framework of competition between legal orders where citizens are free to choose the environmental quality that best corresponds with their preferences. The consequence of this economic approach is that it should be for each Member State to decide whether it prefers economic development to environmental quality.¹⁵² A consequence of this economic argument whereby citizens choose a level of environmental protection according to their preference, is that the environmental quality would vary according to the individual preferences of the citizens. This argument is also used at the normative level in the U.S., where there is increasing pressure in favour of standards being set by the states rather than by a federal environmental agency.¹⁵³ This *economic* argument leads to an environmental federalism in which the

150 Unless the principle of equality is used as a justification for the harmonisation of tort law. See *Spier/Haazen*, ZEuP 1999, 479 f.

151 This paper is not, of course, concerned with the normative question of whether or not the Greek turtle deserves protection. It is concerned only with the question, whether such a decision should be taken in Greece or at the European Community level.

152 Again: this is not to say that Greece should not protect the environment, but only to argue that from an economic point of view, this is not a question that Brussels should be concerned about.

153 *D. Schoenbrod*, Why States, not EPA, should set Pollution Standards, (1996) 4 Regulation 18-25.

environmental quality could differ between Member States as long as there were no transboundary effects and no race-for-the-bottom risks.¹⁵⁴ For areas related to environmental liability, such as soil pollution, this would mean that states would be free to choose their own clean-up and liability standards.

b) Guaranteeing minimum environmental quality?

There is, however, an important legal or policy argument that could lead to centralisation. This has to do with the idea of guaranteeing all European citizens a similar environmental quality.

Again this paper does not argue at the normative level that this would not be a valid argument for centralisation, but it is important to stress that if this argument for centralisation is used, it is only for ecological (or policy) reasons, rather than for economic reasons, that one would strive for harmonisation of environmental quality. A problem with this “European heritage” argument is that it may be valid to defend, say, a European-wide protection of the Coliseum in Rome,¹⁵⁵ but less so to guarantee a minimum environmental quality. In that case it would make more sense to strive for a minimum level of public health across Europe, which is not what happens today.

c) Minimum quality, not liability standards

But if this “European heritage” reason for centralisation in order to guarantee all European citizens a basic environmental quality is accepted, there are several consequences. If externalities are merely local and no race-for-the-bottom risks exist, it is hard to find an economic rationale for centralisation. At the policy level, truly ecological reasons can be advanced for centralisation to guarantee a similar environmental quality throughout the EU. This could take the form of minimum standards which have to be achieved after the reclamation of polluted soil. But then this ecological argument, not the “harmonisation of conditions of competition argument” has to be advanced to justify, say, the guarantee of a minimum environmental quality in Greece.¹⁵⁶

Relating to environmental liability one can argue that this “ecological” argument may be used to defend measures like the European-wide protection of certain specific habitats.¹⁵⁷ However, this is not an argument to harmonise the liability rules that would have to be applied if damage is caused to such a habitat.

3. Example: non-pecuniary losses

Considering the harmonisation of tort law in order to give European citizens a minimum level of protection if they were to become the victims of an accident, one wonders what kind of rules of tort law this would justify. Obviously, it would make no

¹⁵⁴ However, since firms are in a competitive environment a Member State that chooses to impose a high level of protection (and thus high costs on firms) will have to compensate this with, say, lower taxes on wages in order to avoid the exit of business (*Rose-Ackerman, Controlling* (Fn. 23), 41.)

¹⁵⁵ There it is the transboundary (“psychological”) spill-over which justifies European intervention.

¹⁵⁶ If it is accepted that it is for ecological reasons (harmonising environmental quality in the EU) that centralisation is needed, this has consequences for environmental standard setting. This point is further developed in *M. Faure, Regulatory Competition versus Harmonisation in EU Environmental Law*, in: *Esty/Geradin, Regulatory Competition* (Fn. 71), 263-286.

¹⁵⁷ So *Arcuri*, TMA 2001, 41 and see *Revesz* (Fn. 21), 22.

sense to harmonise, for example, the legal technique concerning the use of the negligence rule, since that could still lead to differences in treatment between European citizens. Remember that, from an economic perspective and provided that there are no transboundary externalities and no risk of a race-for-the-bottom this different perspective is no problem since the differences may reflect differing preferences of citizens. For victims, the eventual differences in treatment are probably most visible in the level of damages received especially in the area of non-pecuniary losses.

In the framework of a comparison of amounts awarded for non-pecuniary losses in Europe it can indeed be established that serious differences still exist, both with respect to the question whether some victims (and their relatives) are entitled to non-pecuniary losses, but also as far as the amounts awarded are concerned.¹⁵⁸ Some have therefore argued that it is unacceptable within Europe for a victim who suffers the loss of an arm to receive less in, say, Portugal than in, say, Germany. They implicitly argue that there is no reason to treat those victims differently and the call for harmonisation of the amounts awarded for non-pecuniary losses is therefore justified.¹⁵⁹

What can, again, be said about this argument from an economic perspective? *First* of all one should remember that the differences in amounts awarded for non-pecuniary losses are certainly not pointless, but may reflect differing preferences of the citizens in the various states. In this respect one should, *second*, also remember the lesson of *Coase* that every increase in protection can always be passed on via the price mechanism.¹⁶⁰ In other words if, for example, in the area of product liability one would argue that the Portuguese should pay higher amounts for non-pecuniary losses for victims of product accidents, this would lead to an increase in prices. Indeed, the manufacturer will add the additional damage costs to the price of the products. The effect therefore is that consumers pay a higher price for the protection awarded. It may well be that consumers in Portugal are not willing to pay this higher price. A European intervention forcing all Europeans to come up to, say, the German level, would therefore amount to paternalism.

Third, there may well be specific reasons why certain countries have relatively low amounts of non-pecuniary losses and others have higher. To some extent this may be related to the level of social security. It is difficult to judge, but looking at the difference between the US system and the European system, some claim that the high amounts for non-pecuniary losses in the US constitute to some extent a compensation for the fact that there is no general basic social security system in the US. And indeed, no one would claim that the European level of non-pecuniary losses should come up to the American level.

158 For an overview of the current differences between the Member States as far as the amounts awarded for pain and suffering are concerned, see H. W. V. Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (2001).

159 This argument is made by U. Magnus/J. Fedtke, German Report on non-pecuniary loss, in: Rogers, *Damages* (Fn. 158), 109-128, and in U. Magnus, *Towards European Civil Liability*, in: M. Faure/H. Schneider/J. Smits (eds.), *Towards a European Ius Commune in legal education and research*, forthcoming, 2002; also compare U. Magnus, *European Perspectives on Tort Liability*, (1995) ERPL 427.

160 R. Coase, *The problem of social cost*, (1960) JLE 1.

Some argue that given the higher amount of travel within Europe today (tourism), it cannot be understood why, say, a German professor would receive less for his pain and suffering if he were to have an accident in Portugal rather than in Germany.¹⁶¹ That fact is, again, hardly an argument in favour of harmonisation. Indeed, the fact that the Portuguese would choose a lower level of damage awards for pain and suffering than the Germans reflects differing preferences. There is no reason why the Portuguese would – paternalistically – have to come up to the German level, just to please the German tourist. Being aware that he will not enjoy the same level of protection abroad as in Germany, the latter can, moreover, seek additional protection – if he so desires – in the form of a voluntary first party insurance. Such insurance for tourists is widely available on the market. The mere fact of tourism can therefore hardly be considered to constitute an argument in favour of harmonisation.

In sum, contrary to what is sometimes assumed, there may be very clear reasons why some countries have lower or higher levels of compensation for non-pecuniary losses than others. If this corresponds with differing preferences, one can, at least from an economic perspective, see no need for a general harmonisation merely based on the reason that the existence of such differences is “unjust”.¹⁶²

4. *Example: medical malpractice*

To summarise: from an economic point of view differences between legal systems as far as medical malpractice is concerned do not necessarily lead to inefficiencies. These differences may well be useful, since they may correspond to the different preferences of the citizens. It is possible that the citizens in, say, Germany apparently have a preference for a relatively strict medical malpractice regime with high compensation, but are also willing to pay the corresponding price (either in health care services directly or via the tax system), whereas citizens in, say, the United Kingdom might not demand such a strict medical malpractice regime because they would not be prepared to pay the corresponding price. If these different preferences explain some of the differences between the legal systems, why then should Europe harmonise medical malpractice and force either the Germans to come down to the UK level, or the UK to come up to the German level?

Hence, the conclusion is that the differences are not necessarily bad from an economic point of view. In addition, it may be argued also that these differences in legal regime are not necessarily problematic for health care providers. For health care providers it is obviously important to be able to move freely between Member States. Free movement is, however, hardly affected by differing medical malpractice regimes, but much more by the regulation of health care in general and the mutual recognition of diplomas.¹⁶³

Finally, one could argue that the harmonisation of medical malpractice should not only be looked at from an economic point of view. It may be argued that it is important to guarantee a minimum level of protection for victims of medical malpractice in order

¹⁶¹ See – again – *Magnus/Fedike* (Fn. 159).

¹⁶² For a similar analysis, see *T. Hartlief*, Comments on *U. Magnus*, “Towards European Civil Liability”, in: *Faure/Schneider/Smits* (eds.), *Ius Commune* (Fn. 159).

¹⁶³ See in that respect, *Schneider*, *Anerkennung* (Fn. 118).

to give all European citizens a similar level of protection. This argument, however attractive it may be at the political level, is not very convincing given the fact that health care itself has not been harmonised in Europe to any great extent. It would therefore be strange to make the argument that medical malpractice, which in fact affects the well-being of the citizens relatively marginally, should be harmonised whereas health care in general is not.

D. Policy aspects

I. General

The result of applying economic criteria to the question of whether tort law should be harmonised is that there would only be arguments in favour of making centralised European rules (1) if inefficiencies were fostered by national tort law so that damage could be externalised to other countries or (2) if it could be established that states would attract industry by their lenient tort law standards. The latter is, however, unlikely since states would, on the contrary, be more likely to enact legislation to protect victims of accidents within their own jurisdiction with high tort standards. However, there may be transaction cost savings if European intervention were able to create legal certainty and achieve full harmonisation. Other arguments, such as the need to create a "level playing field" or "the harmonisation of marketing conditions" cannot, at least from an economic perspective, justify centralisation.

These criteria have been examined here with respect to several areas of tort law, particularly product liability and environmental liability, since those were the areas in which Europe has already been active and indeed proposes action. A closer look at the European Product Liability Directive and the White Paper on Environmental Liability has shown that the case for European harmonisation is even weaker. Looking more specifically at the Product Liability Directive and comparing this to the criteria for centralisation we can conclude as follows:

- i. The EC Product Liability Directive is not able to combat the risk of interstate externalities caused by product damage, if such a risk already exists.
- ii. There is no empirical evidence of a risk that states could attract manufacturers with lenient product liability legislation (the directive would only apply to manufacturers). On the contrary, there may be a risk of a race-for-the-top, protecting national victims of product-related accidents.
- iii. The Product Liability Directive, given its high reliance on national law, can never lead to a "levelling of the playing field" or a "harmonisation of marketing conditions".
- iv. The Product Liability Directive, which in fact adds an additional layer of complexity to the labyrinth of conflicting standards of liability, does not lead to uniformity or a lowering of transaction costs.¹⁶⁴

¹⁶⁴ Compare *R. Ackerman, Tort Law and Federalism: Whatever Happened to Devolution?*, (1996) Yale LPR 454.

II. *Public choice considerations*

A question which obviously cannot be avoided when inefficiencies are found is whether this can be explained on the basis of public choice theory. Indeed, one notices that many of the harmonisation efforts do not fit into the economic theory of centralisation and would hence, at least from an economic perspective, not be considered as promoting social welfare. If a certain legislative action cannot be said to promote public interest, public choice scholars would ask the question whether the legislation favours special interest groups.¹⁶⁵ Of course, one can generally hold that the lack of transparency at the European level is a highly useful cover for lobbying activities. Below are two examples which can prove that the desire to create a European liability regime sometimes simply serves the interests of industry and is the result of lobbying.

Some have argued that the comparative lawyers themselves can be considered as a lobby group. Harmonisation efforts will undoubtedly serve their interests since harmonisation requires knowledge of the various legal systems that need to be harmonised. A call for harmonisation does undoubtedly create a demand for comparative lawyers and may hence serve their interests.¹⁶⁶

Finally, in the context of public choice analysis, one should obviously also mention the interests of the European bureaucracy itself. Until 1985 Europe had done relatively little as far as the harmonisation of private law was concerned (because differing legal cultures hampered it). Maybe a European Product Liability Directive, although it did not fulfil the economic criteria for centralisation, might have served the interests of the Brussels bureaucracy to show that Europe could bring about a piece of legislation in an area which is considered important by many lawyers, touches upon manufacturers' interests, and is moreover very sensitive to public opinion. Hence, the fact that the Commission wanted a European Product Liability Directive may to some extent also simply have been due to the prestige with which directive, as one of the first in the area of private law, would be able to invest the European Commission.

III. *Example: product liability*

1. *Fear of an "American" crisis*

Several aspects of the European Product Liability Directive can undoubtedly be considered to be the result of lobbying. Interest group considerations may explain why a Product Liability Directive came into being in the first place. Since it cannot achieve a "harmonisation of marketing conditions", the directive may have been promoted for a reason other than the formally stated goal. One important reason may have been the fear of producers in Europe that a product liability crisis similar to that in the US would develop. One motive for the directive certainly was to avoid some Member States going too far in their wish to protect "consumers". The directive aims at a balanced approach,

¹⁶⁵ For a discussion of harmonisation efforts in Europe from a public choice perspective, see *Van den Bergh*, MJECL 1998, 148-151 and *Van den Bergh*, *Kyklos* 53 (2000) 448-451, and see the recent paper of *R. Revesz*, *Federalism and Environmental Regulation: a public choice analysis*, (2001) Harvard LR 553.

¹⁶⁶ So *Ogus*, (1999) ICLQ 405, and *Ogus* (Fn. 14), 28-32, as well as *Van den Bergh*, *Kyklos* 53 (2000) 449.

as is stressed many times in the green paper on product liability.¹⁶⁷ For that reason, manufacturers have been “protected” with some defences, thresholds, relatively short statutes of limitations and the option to impose a financial cap on liability. Since the directive is clearly mandatory for the areas it covers (meaning that Member States are not allowed to go further in protecting victims in the areas which the directive covers), the directive could at least avoid some Member States imposing overbearing product liability regimes. But the directive may also be considered “defective” in reaching that goal since precisely those areas which could have led to an increase in liability exposure, such as non-pecuniary losses, are not dealt with by the directive.

2. *Agricultural products*

Public choice explanations may also have influenced specific features of the directive. This is obviously the case for the exclusion of primary agricultural products from the scope of the directive in its original form. Some authors held that indeed the increased protection afforded by a strict liability regime was only necessary against the increasing risks of modern industrial production. Strict liability for agricultural products would unnecessarily increase the insurance burden.¹⁶⁸ This explanation, however, is not convincing. Even if agricultural products are produced industrially, they were still excluded from the scope of the directive. This means that a consumer was not able to claim damages against a breeder of veal who has used artificial hormones or against a grain producer who has used dangerous pesticides.¹⁶⁹ It is not at all clear why strict liability does not apply in those cases. The real reason for the exclusion of primary agricultural products was the fact that European farmers engaged in successful lobbying and convinced the politicians that the directive’s strict liability should not be applicable to them.¹⁷⁰

There was increasing criticism of the exclusion of primary agricultural products after the BSE crisis. One effect of the exclusion of primary agricultural producers from liability under the directive was obviously that the liability would in fact be passed on to the industrial processor or producer. If, for example, babyfood was derived from veal which had been treated with hormones, this would not lay a strict liability on the farmer, but on the producer of the finished product.¹⁷¹ Of course, the cattle breeder may have been liable under a fault rule, according to his national tort law.

For these reasons the Product Liability Directive was amended by Directive 1999/34/EC of 10 May 1999,¹⁷² to include defective agricultural products. Again, the functioning of the internal market is given as the most important justification:

“It is necessary and appropriate in order to achieve the fundamental objectives of increased protection for all consumers and the proper functioning of the inter-

167 Green Paper on Liability for Defective Products, 18-20.

168 Tebbens, NJB 1986, 370.

169 N. Reich, Product Safety and Product Liability, (1986) JoCP 143.

170 Reich, (1986) JoCP 143.

171 Reich, (1986) JoCP 143.

172 OJ 1999 L 141.

nal market to include agricultural products within the scope of Directive 85/374/EEC".¹⁷³

The idea is that including primary agricultural products within the scope of the Product Liability Directive would help to restore consumer confidence in the safety of agricultural products. This directive, which includes agricultural products, simply changed the definition of "product" in the Product Liability Directive of 1985 and entered into force on the day of its publication in the Official Journal, which was 4 June 1999.

One could argue that with this new directive, forcing the Member States to apply the product liability regime mandatorily also to agricultural products (whereas before this had been optional), one of the criticisms of the directive (protecting farmers as a result of lobbying) has disappeared. However, the Commission's quick action shows that sensitivity to European public opinion and the decreasing influence of the agricultural lobby are probably more important reasons for action by the European Commission than concerns to promote economic welfare.

3. *Compensation fund*

Another example may be seen in the proposal which was made during the discussion preceding the EC Product Liability Directive to set up a compensation fund as an alternative to product liability. This, however, stood no chance in the face of lobbying by the insurance industry, which feared losing business.¹⁷⁴ Therefore, *Van den Bergh* argues, the European Product Liability Directive is to a large extent to be considered the result of rent-seeking by industry instead of an instrument to increase economic welfare.¹⁷⁵

4. *Erecting barriers to entry?*

The same can be said, moreover, for the general justification of many European directives, i.e. the "harmonisation of conditions of competition". This argument is often used by industry in Member States where strict national regulation already applies. In those cases European harmonisation has as its main effect the erection of artificial barriers to entry. This may also have played a role in the context of the European Product Liability Directive and it merits careful analysis even if it has not also played a role with respect to the general Product Safety Directive. We must not forget that in some Member States, especially in countries such as Germany, the Netherlands and Belgium, a relatively high and elaborate level of product safety already existed before the directive. Industry in those Member States thus had an interest in lobbying for stringent safety standards at the European level, for the simple reason that they already had to comply with such safety standards nationally. By making their stringent national standards the European norm they may impose them on their southern competitors. Indeed,

¹⁷³ See Recital 9.

¹⁷⁴ See *M. van Empel/H. Ritsema*, *Aansprakelijkheid voor producten* (1987), 53.

¹⁷⁵ *Van den Bergh*, *MJECL* 1998, 151.

as *Ogus* holds: producers will favour stringent specifications standards if they result in protection against domestic and foreign competitors.¹⁷⁶

One should, therefore, always be careful with the "harmonisation of conditions of competition"-argument, as it is presented in European rhetoric, since it may favour particular interest groups.

Moreover, one should also be careful with respect to the European Product Safety Directive in so far as this refers to technical specification standards or codes of good practice, as the standards may, once more, function effectively as barriers to entry. This is a point that certainly merits further empirical investigation.

IV. *Example: environmental liability*

We concluded that relatively few economic arguments can be found to justify centralisation in the area of environmental liability. It was only justified by transboundary pollution and even then the question arose whether the same result could not be reached through different and less extensive legal measures than total harmonisation.

Nevertheless, we found that there seem to be strong forces in Brussels striving for a European environmental liability regime, at least for damage to biodiversity. A draft directive has now been submitted. To some extent this can still be explained on public interest grounds, since we also indicated that non-economic, ecological arguments, may be advanced in favour of a minimum quality of reclamation for polluted soils. However, public choice scholars have taught that there is always a risk that regulation in fact serves the interests of particular pressure groups.¹⁷⁷

Indeed, another non-economic reason why the European Union would like to harmonise liability legislation can be found in public choice theory. With respect to environmental standard-setting, intensive rent-seeking behaviour by interest groups can be identified. European industries may be confronted at state level by 'green' non-governmental organisations (NGOs), whereas these countervailing powers may have less force in Brussels. Moreover, the lack of transparency in the decision-making process, which is often used to reproach the European Union, will stimulate European industries to engage in serious lobbying.

The lobbying does not necessarily have to result in lower environmental standards. In particular cases, special interest groups representing industry may, understandably, lobby in favour of harmonisation at a higher level of environmental protection.¹⁷⁸ Interest groups in areas that are already heavily regulated may have incentives to extend their strict (national) regulations to the European level, forcing foreign competitors to follow the same strict regulation with which they already comply. The result is, again, that industry will lobby to erect artificial barriers to entry. In addition, green NGOs will be pleased with this lobby and will obviously support the demand to transfer strict

¹⁷⁶ *Ogus*, Regulation (Fn. 97), 198.

¹⁷⁷ For a public choice analysis of (de)centralisation of environmental law see *J. Ferejohn*, The political economy pollution control in a federal system, in: *Revesz/Sands/Stewart*, Environmental Law (Fn. 21), 96-103.

¹⁷⁸ See also *Esty/Geradin*, (1997) 21 Harvard ELR 303.

national standards into a European standard.¹⁷⁹ Thus, industry in heavily regulated (and probably polluted) areas can (supported by green NGOs) force their very stringent standards upon their (southern) competitors, although these Member States probably would not need these stringent standards if the policy goal were only one of reaching a uniform level of environmental quality.

Thus it becomes clear that the “harmonisation of conditions of competition” argument is used to serve the interests of industries in heavily regulated areas by erecting barriers to entry. Hence, environmental law can be used to limit market entry and environmental law is abused to serve private interest goals.

This leads to the conclusion that the “harmonisation of conditions of competition” argument, as presented in European rhetoric, can be problematic, from both the economic and ecological points of view, and in fact serves the interests of industrial groups in heavily regulated areas.¹⁸⁰ It can actually be in their interests that “conditions of competition” are harmonised.

It is not clear yet whether the current harmonization efforts with respect to environmental liability should be considered as an attempt by interest groups to create barriers to entry. The Commission has argued that the White Paper deals with a topic, damage to biodiversity, which has not yet been the subject of legislation in the Member States. That is, however, only partially the case. Most Member States may indeed lack specific rules – such as rules concerning the way in which damage to natural habitats has to be calculated. But the White Paper also addresses the problem of soil pollution, for which extensive regulations exist in most Member States. Thus, theoretically, there is still the risk that industry in Member States with stringent soil reclamation regulations would strive for centralisation and so create a barrier to entry for competitors from countries where these strict standards do not yet apply.

It is too early to assess whether the desire to create a European environmental liability regime in fact serves the interests of industry. One should, however, always be aware of the risk of centralisation being abused to create barriers to entry.

E. Concluding remarks

I. Reasons for harmonisation: a few general lessons from the economic debate

Today there is undoubtedly a general trend among academic lawyers in favour of the harmonisation of private law in Europe, including the field of tort law.¹⁸¹ Symptomatic in this respect are major projects such as those focusing on a European civil code. In this paper I did not focus on the complicated question of how such a harmonisation

179 These “alliances” between environmentalists and domestic producers are also discussed in *Vogel* (Fn. 81), 52-55.

180 This is not to say that there is no risk of regulatory capture resulting in inefficient standards at the level of the Member States, compare (in the US context) *Rose-Ackerman*, *Rethinking* (Fn. 10), 166 and 173. However, in Europe, it is especially the untransparent Brussels bureaucracy which is feared from a public choice perspective.

181 See, e.g., *N. Jansen*, *Auf dem Weg zu einem europäischen Haftungsrecht*, ZEuP 2001, 30; *Kozioł*, ZEuP 1996, 587; *U. Magnus*, *European Perspectives of Tort Liability*, (1995) ERPL 427; and compare *J. H. Nieuwenhuis*, *Wat is een onrechtmatige daad? Europese perspectieven*, RMThemis 1998, 242.

of tort law in Europe could be achieved, nor did I focus on the actual differences between the tort laws of the European Member States today. This paper used the economic analysis of law to focus on one specific aspect of the harmonisation debate, i.e. the question whether there should be any harmonisation at all and if so, in what areas. One indeed sometimes gets the impression that this basic question concerning the need for harmonisation seems to be forgotten as a result of a great enthusiasm for the challenge of harmonisation. In this paper I have tried to show that the economic analysis of law, more specifically the economics of federalism, provides balanced answers to questions about harmonisation.

The starting point of economic analysis is seemingly different from the one often heard in the European debate. Economists do stress that differences as such are not a bad thing at all, provided that those differences also reflect the differing preferences of citizens.¹⁸² The starting point is therefore that these differences should be respected and that they may even contribute to an increased quality of the legal system because legal systems will compete to provide the best legal order to their citizens. Of course, some may argue that it is questionable whether the fact that in Portugal, for example, lower amounts are awarded for pain and suffering than in Germany really reflects the preferences of the Portuguese citizens. That is, however, a dangerous line of reasoning. It questions the ability of a national legislator or judge to set damage awards according to the preferences of the citizens and therefore basically questions the democratic nature of the decision-making process in that respect. Moreover, even if one doubts the ability of the national legislator or judge adequately to take into account the preferences of citizens, there is still no reason to assume that Europe would do a better job in that respect. Why should we assume that the European bureaucrats in Brussels would better be able to know what the preferences of the Portuguese are than the Portuguese themselves? To do so is a paternalistic and dangerous argument. Legislation that allows for different national preferences will, moreover, have the advantage that it will lead to competition between legal orders.

However, it was equally indicated that in some cases this basic idea of competition between legal orders may not provide optimal outcomes. The economic literature makes clear that there may be an argument in favour of harmonisation where transboundary externalities exist, but this does not justify a total harmonisation of tort law. It merely calls for a regulation of transboundary accidents at the centralised level. The other economic argument in favour of harmonisation is the risk of destructive competition, also referred to as the "race-for-the-bottom". However, it seems very unlikely that within the European context states will compete in order to attract industry with lenient tort laws. There is no empirical evidence at all that currently Member States of the European Union would have engaged in such a race for the bottom with an inefficient tort law. It is much more likely that a race-for-the-top will take place, since states will probably prefer to protect their national citizens who may also suffer accidents.

Moreover the traditional "economic" European argument – that harmonisation of the conditions of competition is necessary in order to create a level playing field – was

182 Some lawyers also follow this line of reasoning. See e.g. *J. Smits, The good Samaritan in European private law* (2000), 43, who writes "In praise of Diversity".

critically discussed and rejected as being wrong. This argument has been used for a long time in Europe. To some extent this was understandable, since the argument for the “harmonisation of marketing conditions” was necessary to give Europe competencies in specific matters. However, it is very doubtful whether such harmonisation of marketing conditions is desirable, since this could justify a (largely unnecessary) harmonisation of all sorts of legal rules, because all kinds of legislation could arguably have an influence on marketing conditions. Moreover, the initiatives that Europe has taken so far with respect to tort law have not proven to be a major success. All legal writers agree, for example, that the European Product Liability Directive can never lead to the harmonisation of marketing conditions and the European White Paper on Environmental Liability has not been received with great enthusiasm either, at least as far as the harmonisation aspect is concerned.¹⁸³ Moreover, the European directives generally seem to have the problem that they follow the “top/down” approach, whereby the European regime is mandatorily imposed upon the Member States, sometimes as an additional layer of protection, such as in the case of the European Product Liability Directive. The Commission itself recently reported that in this area of product liability victims do not seem to use the regimes based on the European Product Liability Directive, but still largely rely on national legislation¹⁸⁴. This should lead to a critical review of the harmonisation efforts undertaken by the European Commission. Unfortunately, the Commission seems only interested in promoting further harmonisation instead of focusing on less (and maybe better) harmonisation.¹⁸⁵

It is important to stress that from an economic perspective probably the most important reason in favour of centralisation of tort law is the potential for reducing transaction costs. To some extent one can certainly argue that various tort rules in the Member States reflect similar preferences and only differ as a result of differing legal techniques and dogma. If it were possible to align tort rules that reflect similar preferences, this could certainly be considered a gain. That is precisely the approach chosen in a variety of (mostly privately initiated) academic projects on harmonisation of tort law.¹⁸⁶ In most of these projects the academics involved analyse the existing differences between the various aspects of tort law in the Member States and try to find a common denominator. This approach seems to be more promising than that chosen by the European Commission. The top-down approach of imposing directives on Member States has so far not been very successful. The approach chosen by the academic groups focuses on the search for a *ius commune* and can therefore be called “bottom up”. If these groups succeed in showing that some differences are merely of a technical nature

183 See *Faure/De Smedt*, (2001) 5 EL 217-237.

184 Report on the product liability directive of 31. 01. 2001, COM (2000) 893 final.

185 See Green Paper on Liability for defective products (COM (1999) 396 final).

186 It is not possible to mention here all the harmonization projects with respect to private law (for an overview of all the projects, see *E. H. Hondius*, Towards a European civil code?, in: *Faure/Schneider/Smits* (eds.), *Ius Commune* (Fn. 159) and *Jansen*, ZEuP 2001, 31). For the area of tort law we can refer to the Principles project of the European Group on Tort Law, led by *Professor Koziol* (Vienna). For an overview of their work and working, see *Spier/Haazen*, ZEuP 1999, 469. Another initiative is part of the project on a European civil code, co-ordinated by *Professor von Bar* (Osnabrück). For an overview of his vision with respect to the harmonisation of tort law, see *von Bar*, ZEuP 2000, 515.

which do not touch upon or relate to differing preferences, then they may well prove to be more successful than the European Commission.

Moreover, the work of these groups has the advantage that their proposals for a European tort law are based on a general concept of tort law. The various approaches chosen, so far, in the European directives are so different that any general concept is clearly lacking.¹⁸⁷

II. *What to harmonise: a few specific hints from the economic debate*

The focus on the common denominator, respecting divergent national preferences and legal traditions, may also more easily overcome traditional hostilities against the Europeanisation of tort law in the Member States. Moreover, as was already indicated in the introduction, the economic analysis of tort law has particularly focused on the basic functions and goals of tort law. Hence, economic analysis can certainly contribute to the finding of a *ius commune* of tort law in Europe. Whether the groups referred to above will be successful is obviously difficult to predict. Some have stressed the importance of legal tradition and legal principles. Indeed, from an economic perspective it is arguable that different legal rules sometimes serve the same purpose and may thus easily be harmonised. However, in some cases the different rules are so heavily rooted in differing legal cultures and traditions that the costs of harmonisation may be huge, some would argue even prohibitive.¹⁸⁸ From an economic perspective it can, obviously, merely be said that harmonisation based on a potential for the reduction of transaction costs makes sense only if the marginal costs of this harmonisation effort are lower than the marginal benefits of unification.

However, economics can provide a few guidelines to these unification groups as far as the topics and methods of harmonisation are concerned.

First, it seems important primarily to focus on those areas of tort law where preferences do not differ. One may think of the choice between a strict liability regime on the one hand and negligence/fault on the other hand. If it can be established that the legal systems largely agree on the area where a strict liability regime should be applied, then the differences in form are arguably only technical and do not reflect varying preferences.¹⁸⁹

The same may be argued, for example, concerning the balancing of interests to be undertaken by the judge in a negligence case when he has to establish a standard of care for a particular behaviour and when the wrongfulness of the behaviour of the defendant

187 So H. Koziol, *Ein europäisches Schadenersatzrecht – Wirklichkeit oder Traum*, JBl 2001, 32-33 and P. Widmer, *Die Vereinheitlichung des europäischen Schadenersatzrechts aus der Sicht eines Kontinental-Europäers*, RHDI 52 (1999), 99.

188 That point has especially been made by Legrand, MJECL 1997, 111.

189 I certainly do not want to argue that there are no differences between the Member States as far as the cases are concerned to which a strict liability rule applies. Some might argue that the differences, say, between France and the United Kingdom in that respect are huge (for an overview, see Koch/Koziol, *Unification* (Fn. 126); and see W. van Gerven/J. Lever/P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (2000), 467-687; and see von Bar, *Torts* (Fn. 128), 333-432). The point is only made that if there were – factual – agreement, say, on the strict liability of the guardian of a dangerous installation, this would mean that preferences on that point would not appear to differ.

has to be established. If the research groups were to find out that, although the wordings and principles are dramatically different, the underlying methodology is similar, harmonisation may be possible.¹⁹⁰ However, the level at which a judge in a particular legal system will pitch this duty of care may again be strongly linked to differing preferences. Thus it may be possible to indicate that whatever methods judges use to establish negligence in a particular case, the appropriate care required from a physician in Portugal in a medical malpractice case may well be totally different from the care required from a physician in Germany.¹⁹¹ This shows that it may be possible to call for centralisation, but that this centralisation should not necessarily be equated with harmonisation;¹⁹² thus, in the example, one can centralise the way in which judges establish the standard of negligence, but this may be combined with a differentiated application of the duty of care in specific cases.¹⁹³ Thus one could aim at a *flexible system*¹⁹⁴ with a harmonization of some general notions at the European level, but on the other hand retain a sufficient degree of flexibility to account for diverging preferences between Member States.

The example, again, shows that harmonisation cannot be addressed in black and white statements. Some issues may be harmonised at relatively low cost, whereas others (which are closely related to preferences) have to be differentiated. To provide another example and guideline: one should probably be very careful to strive for harmonisation in those areas of tort law which are indeed clearly linked to national preferences and values. This is probably the case for the issue of compensation for non-pecuniary losses. First of all, the benefits of harmonisation in that area should be made clear; second, it is very likely that the costs of harmonisation would be huge and, third, harmonisation would constitute a paternalistic measure and entail disrespect for the preferences of citizens. Even a call for the need to provide the same minimum protection to all accident victims within Europe can hardly justify the cost of paternalism.

However, with this statement and the reference to the need for providing a basic level of victim protection we have left the area of economics. Indeed, the reader should recall once more that in this paper I have only provided "one view of the cathedral". I have merely addressed the question of whether a harmonisation of tort law is needed

190 See on that point generally, *Koziol* (Fn. 127) and for a comparison of the wrongfulness concept in Austria and Germany, *Koziol*, JBI 2001, 29-38 and *P. Lewisch*, A comparison of the Negligence Concept of the German BGB and the Austrian ABGB in an Economic Perspective, paper presented at the Annual conference of the European Association of Law and Economics in Vienna, September 2001, as well as *C. C. van Dam*, *Aansprakelijkheidsrecht: Een grensoverschrijdend handboek* (2000), 143-150.

191 Comparative research has indicated that this is indeed the case. See *Faure/Koziol*, *Medical Malpractice* (Fn. 92).

192 This was correctly argued in the context of environmental liability by *Arcuri*, TMA 2001.

193 See, however, *Koziol*, JBI 2001, 33, who argues that a harmonization effort resulting in vague notions which would leave the normative choices in specific cases to the national legislators or judges would be insufficient. Cf. also *Spier/Haazen*, ZEuP 1999, 484, arguing that "the use of standards as a smoke-screen for deep disagreement creates a false consensus".

194 This idea of a flexible system in tort law comes from the Austrian scholar *W. Wilburg*, *Die Elemente des Schadenersatzrechts*, 1941 and *Entwicklung eines beweglichen Systems im bürgerlichen Recht*, 1950. See also *H. Koziol*, *Rechtswidrigkeit, bewegliches System und Rechtsangleichung*, JBI 1988, 619.

from an economic perspective. This is not a totally useless exercise since the European Commission itself has long advanced an economic reason (harmonisation of marketing conditions) to justify European action. That reason is, as I have tried to show in this paper, particularly weak.

The conclusion at the normative level, however, should not necessarily be that there is no need for any European action at all with respect to tort law.¹⁹⁵ My main problem is that the Commission still seems to be tangled up in the wrong thinking pattern. There may be other, non-economic, reasons to justify harmonisation. But then these goals and expectations should be spelt out specifically. Even those who dream of a European tort law as a political ideal (even though this may violate the preferences of citizens) may still benefit from economic analysis. Economics can help to show whether the methods of harmonisation chosen in a particular case will lead to the goals envisaged. Moreover, those who blindly follow an unbalanced harmonisation dream should also be aware of the fact that in some cases they may (probably unknowingly) be instruments in the hands of powerful lobby groups who benefit from harmonisation. In this respect the important lesson from the public choice school should be remembered that, whenever inefficient regulatory measures are enacted there is usually a special interest group that benefits from this action.

Moreover, it seems important to take the subsidiarity principle seriously in the debate on the harmonisation of tort law within Europe. Within the context of that debate attention should obviously also be given to the legal basis for harmonisation efforts in the area of tort law. Once these European legal issues are addressed more carefully (which was not the brief of this paper) the conclusion may be reached that, given the subsidiarity principle, a general harmonisation effort concerning tort law is problematic and that a balanced approach, focusing on (a modest) harmonisation in specific areas, may be more warranted. Then the economic criteria which do provide a balanced approach to the harmonisation issue can again be helpful.

195 Compare *Spier/Haazen*, ZEuP 1999, 477: "Nor is convergence or unification of private law ever strictly speaking necessary... If we favour convergence of European private law, we deem it simply *desirable*, perhaps highly desirable, but nothing more". This desirability of the harmonisation of private law in Europe is, however, highly criticised – inter alia – by *J. M. Smits*, *Waarom harmonisering van het contractenrecht (via beginselen) onwenselijk is*, *Contracteren* (2001), 73-74.